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No. _____

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In The

Supreme Court of the United States

October Term, 1991

WESTERN FARM CREDIT BANK,

Petitioner,

v.

ELMER FOBIAN AND ELSE FOBIAN,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a federal bankruptcy proceeding involving a creditor's successful objection to a solvent debtor's plan of reorganization, did the Ninth Circuit err in creating an unwritten, *per se*, federal rule that a contractual attorneys' fee provision (that is otherwise enforceable under state law) is inapplicable in bankruptcy when "the litigated issues involve not basic contract enforcement questions, but issues peculiar to federal bankruptcy law"?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Western Farm Credit Bank, and the Respondents, Elmer Fobian and Else Fobian. Western Farm Credit Bank is a federally chartered instrumentality of the United States and is part of the federal Farm Credit System. 12 U.S.C. §§ 2001 *et seq.*

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PETITION FOR WRIT OF CERTIORARI

Western Farm Credit Bank, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on December 24, 1991.

OPINIONS BELOW

The December 24, 1991, opinion of the Court of Appeals for the Ninth Circuit affirms the judgment of the Bankruptcy Appellate Panel of the Ninth Circuit reversing the judgment of the bankruptcy court. The opinion is

reported at *In Re Fobian*, 951 F.2d 1149 (9th Cir. 1991). The Court of Appeals for the Ninth Circuit denied Western Farm Credit Bank's Petition for Rehearing on February 4, 1992. The Ninth Circuit's Opinion and the Order denying the Petition for Rehearing are reprinted as Appendix A to this Petition at App. 1.

On August 16, 1990, the Ninth Circuit Bankruptcy Appellate Panel ("BAP") entered its Memorandum reversing the bankruptcy court's confirmation of the Respondents' Chapter 12 Plan. The BAP's decision was appealed by the Respondents to the Ninth Circuit Court of Appeals. The BAP's Memorandum was not published and is reprinted as Appendix B to this Petition at App. 12.

The Memorandum Opinion and Order Including Findings of Fact and Conclusions of Law of the Bankruptcy Court for the Eastern District of California confirming Respondent's Chapter 12 plan was entered on August 7, 1989. The Order of Confirmation of Debtor's Plan at Reorganization was entered on August 25, 1992. The bankruptcy court's opinion was not published and the Opinion and the Order of Confirmation are reprinted as Appendix C to this Petition at App. 24.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 24, 1991, affirming the judgment in favor of the Petitioner entered by the Bankruptcy Appellate Panel. Petitioner's Petition for Rehearing was denied on February 4, 1992. This court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case arose from Petitioner's – a creditor of Respondents who are in Chapter 12 bankruptcy – successful efforts to oppose confirmation of Respondents' Chapter 12 plan. Petitioner opposed confirmation of the plan under Sections 1225(a)(4) and 1225(b)(1)(A) of the Bankruptcy Code, Title 11 of the United States Code. 11 U.S.C. § 1225(a)(4) provides, in relevant part:

> Except as provided in subsection (b), the court shall confirm a plan if –
>
> . . .
>
> (4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such a claim if the estate of the debtor were liquidated under chapter 7 of this title on such date; . . . .

11 U.S.C. § 1225(b)(1)(A) provides in relevant part:

> If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan –
>
> (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim.

While the Ninth Circuit affirmed the Bankruptcy Appellate Panel's reversal of the confirmation of Petitioner's plan, the Ninth Circuit denied Petitioner's request for attorneys' fees that were otherwise recoverable under

state law pursuant to a contractual attorneys' fees provision. Petitioner believes that its attorneys' fee provision is enforceable in bankruptcy and that its fees should be made part of its allowed unsecured claim. 11 U.S.C. § 506(a) defines secured and unsecured claims. Section 506(a) provides as follows:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. . . .

Secured creditors are generally allowed to recover attorneys' fees, if provided by their contract, up to the amount of their security under 11 U.S.C. § 506(b), which provides as follows:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges as provided for under the agreement under which such claim arose.

The allowance of claims generally is governed by 11 U.S.C. §§ 502(a) and (b), which provide in relevant part:

> (a) A claim or interest, proof of which is filed under section 501 of this title, is deemed

> allowed, unless a party in interest . . . objects.
>
> (b) . . . [I]f such objection to a claim is made, the court, after notice and hearing, shall determine the amount of such claim . . . and shall allow such claim in such amount except to the extent that –
>
> (i) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured . . . .

Respondents are solvent Chapter 12 debtors. 11 U.S.C. § 726(a)(5) provides that post-petition interest on claims be paid if the funds are available. 11 U.S.C. § 726(a)(5) provides, in relevant part:

> Except as provided in section 510 of this title, property of the estate shall be distributed –
>
> . . .
>
> (5) Fifth, in payment of interest at the legal rate from the date of the filing of the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this subsection . . . .

Petitioner's promissory note and deed of trust are governed by California law. Attorneys' fees provisions in contracts in California are enforceable under Cal. Civil Code § 1717(a) which provides as follows:

> In any action on a contract, where the contract specifically provides that attorneys' fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party

> who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorneys' fees in addition to other costs.
>
> . . .
>
> Reasonable attorneys' fees shall be fixed by the court and shall be an element of the costs of suit. . . .

I.

STATEMENT OF THE CASE

This case involves the proper interplay of the Bankruptcy Code and state law relating to the allowance of a creditor's claim for attorneys' fees incurred in bankruptcy proceedings. In broadly devising a *per se* rule that a contractual attorneys' fee provision is inapplicable when "the litigated issues involve not basic contract enforcement questions, but issues peculiar to federal bankruptcy law," the Ninth Circuit went far beyond the language and purpose of the Bankruptcy Code, and even undermined the clear language of 11 U.S.C. § 506(b) in holding that, notwithstanding a contractual attorneys' fees clause, "where the litigated issues involve not basic contract enforcement questions, but issues peculiar to federal bankruptcy law, attorneys' fees will not be awarded absent bad faith or harassment by the losing party." *In re Fobian*, 951 F.2d 12149, 1153 (9th Cir. 1991).

The Fobians are solvent Chapter 12 debtors. They were current on all obligations except a loan from petitioner Western Farm Credit Bank ("the Bank"). The Bank

holds a promissory note secured by 70.5 acres of land located in Glenn County, California. The promissory note executed by the Fobians in favor of the Bank provides for reimbursement of attorneys' fees and costs to the prevailing party. The promissory note provides:

> Each of the undersigned . . . agrees to pay reasonable attorneys' fees and costs incurred in collection of payment due, or in the enforcement of any right or remedy hereunder.

The deed of trust executed by the Fobians in favor of the Bank also contains a provision for attorneys' fees. The deed of trust provides:

> (3) Beneficiary may . . . (b) appear in and litigate any matters, *including condemnation and bankruptcy proceedings*, affecting the security of lien, and may incur necessary costs, expenses, and attorneys' fees therefor . . . which advances, together with interest accrued thereon shall be immediately due and payable . . . . (Emphasis added.)

After the Fobians filed their Chapter 12 petition, the Bank filed a Proof of Claim for $191,660.09. The Fobians made no objection to this Proof of Claim. The Fobians' plan asserted that the Bank's collateral was worth only $70,500. Under the normal application of 11 U.S.C. § 506(a), the Bank would have an allowed secured claim to the extent of the value of the collateral as determined by the bankruptcy court, and an allowed unsecured claim for the remainder.

The Fobians submitted their "First Amended Plan for Reorganization under Chapter 12" (the "Plan"). The Bank filed objections to the Plan, and a confirmation hearing

was held on June 27, 1989. The Bank objected to confirmation of the Plan on the grounds that the Plan made no provision for payment of the unsecured portion of the Bank's claim (the deficiency between the amount of the debt and the value of the collateral) and thus did not comply with Section 1225(a)(4). The Bankruptcy Court nonetheless confirmed the Plan in a Memorandum Opinion and Order Including Findings of Fact and Conclusions of Law filed on August 7, 1989.

The Bankruptcy Appeal Panel ("BAP") reversed, holding that, because the Plan did not meet the requirements of Section 1225, it could not be confirmed. The Fobians appealed the BAP decision to the Ninth Circuit. The Bank argued for affirmance of the BAP's decision, and asked that the Ninth Circuit award it attorneys' fees and costs. The Ninth Circuit affirmed the BAP's decision, awarded the Bank its costs on appeal, but denied the Bank's request for attorneys' fees, despite the contractual provision in the loan documents for an award of fees, on the ground that "where the litigation issues involve not basic contract enforcement questions, but issues peculiar to federal bankruptcy law, attorney's fees will not be awarded absent bad faith or harassment by the losing party." 951 F.2d at 1153.

In refusing to allow a claim for fees, the Ninth Circuit provided no guidance as to when a creditor's ordinary activities in a bankruptcy involve issues "peculiar to federal bankruptcy law." Petitioner's activities here were commonplace – objecting to a plan that failed to provide for any payment of a portion of Petitioner's claim. The Ninth Circuit described this activity of defending a claim

as follows: "[T]he Bank sought proper application of Sections 506 and 1225. This was not a traditional 'action on the contract.' " *Id.* This overly broad rule, which finds no written basis in Section 506 or elsewhere in the Bankruptcy Code, throws into confusion the allowance of all claims for fees incurred by creditors in bankruptcy proceedings.

II.

REASONS FOR GRANTING THE WRIT

This case is a symptom of the Ninth Circuit's confusion over the statutory basis for the award of post-petition attorney's fees in bankruptcy proceedings. Until *Fobian*, there at least was agreement that, under the plain language of 11 U.S.C. § 506(b), a secured creditor may recover its reasonable attorneys' fees up to the value of its security if attorney's fees are provided for in the parties' underlying contract. However, the Bankruptcy Code is silent as to whether an undersecured or unsecured creditor may make its post-petition attorneys' fees part of its unsecured claim. Out of this silence, a cacophony of disagreement has arisen from the courts, and the *Fobian* ruling is so overbroad that it undermines the literal language of Section 506(b) and casts doubt even on whether a fully secured creditor may recover fees under Section 506(b) when the litigated issues involve federal bankruptcy law rather than basic contract enforcement issues. *Fobian* is an unwarranted departure from the "American Rule" for attorneys' fees, and encourages forum-shopping in what should be a national bankruptcy scheme.

The cases which addressed this question under the former Bankruptcy Act held that where a creditor makes a claim under a contract which provides for the recovery of attorneys' fees, post-petition attorneys' fees are added to the creditor's unsecured claim. *See, e.g., In re United Merchant and Mfrs., Inc.*, 674 F.2d 134 (2nd Cir. 1982). In *United Merchant*, the Second Circuit even stated that it thought that there was nothing in the provisions of the new Bankruptcy Code (which became effective in 1979) which would change this rule. *United Merchant, supra*, 674 F.2d at 138.

In deciding the same question under the current Bankruptcy Code, some courts have followed the former Bankruptcy Act rule and have made post-petition attorneys' fees part of a creditor's unsecured claim. *Transouth Financial Corp. of Florida v. Johnson*, 931 F.2d 1505, 1507 (11th Cir. 1991); *In re Martin*, 761 F.2d 1163, 1168 (6th Cir. 1985). However, other courts have departed from this rule and denied the creditor's request that post-petition attorneys' fees became part of its allowed claim. The courts which have denied claims for attorneys' fees have generally done so on two grounds. The first group has read 11 U.S.C. § 506(b) as to the exclusive basis for a claim for fees, and read Section 506(b) to limit the recovery of attorneys' fees to oversecured creditors. *See, e.g., In re Sakowitz*, 110 B.R. 268, 275 (Bankr. S.D. Tex. 1989). The second group has held that where the question before the court is one of federal bankruptcy law rather than contract enforcement, attorneys' fees will not be awarded. *See, e.g., In re Coast Trading Co., Inc.*, 744 F.2d 686, 693 (9th Cir. 1984); *compare, In Re J.F. Hink & Son*, 815 F.2d 1314,

1318 (9th Cir. 1987) (fees awarded for litigating a dispute over Section 365 of the Bankruptcy Code).

In *Fobian*, the Ninth Circuit correctly begins its analysis of the attorneys' fees claim with the statement that awards of attorneys' fees in bankruptcy are governed by state law. However, without any analysis of the application of state law in bankruptcy proceedings, the Court then announces an unwritten, *per se* rule *against* the award of attorneys' fees as part of a creditor's claim in bankruptcy proceedings where the litigated issues are "peculiar to bankruptcy law" rather than are "basic contract enforcement questions." The Ninth Circuit's broad rule not only conflicts with the history of attorneys' fees in general, but also creates a conflict with the Sixth Circuit, the Eleventh Circuit, the Southern District of New York, the Western District of Kentucky, and the Bankruptcy Court for the Northern District of Texas. See, *Transouth Financial Corp. of Florida v. Johnson*, 931 F.2d 1505, 1507 (11th Cir. 1991); *In re Martin*, 761 F.2d 1163, 1168 (6th Cir. 1985); *Liberty National Bank v. George*, 70 B.R. 312, 317 (W.D. Kentucky 1987); *In re Ladycliff College*, 56 B.R. 765, 769 (S.D.N.Y. 1985); *In re Missionary Baptist Foundation of America, Inc*, 24 B.R. 970, 971 (Bankr. N.D. Tex. 1982). Additionally, the *Fobian* rule cannot be harmonized with the Ninth Circuit's own ruling in *In Re J.F. Hink & Sons*, 815 F.2d 1314, 1318 (9th Cir. 1987).

The Ninth Circuit has created unneeded confusion among participants in bankruptcy proceedings. This conflict must be resolved, as the issue is one that is integral to a national bankruptcy law that is intended to be uniformly applied to avoid forum shopping and the coincidence of jurisdiction determining the outcome of a

material issue in a particular case. The Ninth Circuit's creation of a *per se* rule without guidance as to which "issues peculiar to bankruptcy law" it applies to, and what attorneys' fee rule it is interpreting, leaves every participant in federal bankruptcy proceedings in a precarious position with no means of determining whether attorneys' fees will be recoverable or how such a determination is to be made. This confusion will, of itself, cause more attorneys' fees to be incurred. This issue, which presents itself in almost every bankruptcy proceeding, should not be the subject of conflicts among the courts or indefiniteness within them.

The Ninth Circuit's *per se* rule is wrong for a number of reasons. First, no court has ever interpreted Section 506(b) to deny a fully secured creditor a claim for its attorneys' fees on the grounds that the litigated issues were "peculiar to federal bankruptcy law." *See, e.g., In re McGaw Property Management, Inc.*, 133 B.R. 227, 229-230 (Bankr. C.D. Cal. 1991) (under 506(b), award of attorneys fees is *mandatory* if creditor is oversecured and fees are provided for in the underlying agreement). The broad rule enunciated in *Fobian* now encourages disputes over fees if the issues litigated were "peculiar to federal bankruptcy law."

Second, *Fobian* provides no criteria to determine what are issues peculiar to federal bankruptcy law. The few prior cases which have denied attorneys' fees on the grounds that the litigated issues were peculiar to bankruptcy law involved very narrow issues as to the threshold applicability of bankruptcy proceedings to the creditor's claim. *See, e.g., In re Coast Trading Co., Inc.*, 744 F.2d 686 (9th Cir. 1984). The Ninth Circuit's newly-created

inclusion in *Fobian* of a creditor's ordinary attempt under Section 506 and 1225 to defend its unsecured claim in the category of cases which deal with issues "peculiar to bankruptcy law" leaves essentially *no* activity by a creditor beyond attack by a debtor or trustee.

Third, the refusal to make attorneys' fees part of a creditor's claim is a departure from the "American Rule" which governs the award of attorneys' fees in federal courts. Under the "American Rule," each party pays its own fees unless there is an enforceable contract which provides for them. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 257, 95 S. Ct. 1612, 1621, 44 L. Ed. 2d 141 (1975). The Ninth Circuit, through its ruling in *Fobian*, has declared that even when a contract expressly provides for attorneys' fees resulting from bankruptcy proceedings to be recovered, that clause is unenforceable. The Ninth Circuit's rule goes beyond the Bankruptcy Code's written provisions and is at odds with previous bankruptcy law on attorneys' fees, and with federal law (the American Rule) on the award of attorneys' fees in general.

III.

THE NINTH CIRCUIT'S RULING IS IN CONFLICT WITH DECISIONS OF THE SIXTH AND ELEVENTH CIRCUITS AND VARIOUS DISTRICT AND BANKRUPTCY COURTS

The Ninth Circuit's decision to deny post-petition attorneys' fees in *Fobian* is in conflict with decisions in other federal courts. In *In re Martin*, 761 F.2d 1163 (6th Cir. 1985) the Sixth Circuit held that "[C]reditors are entitled to recover attorneys' fees in bankruptcy claims if

they have a contractual right to them under state law, ... " *Id.* at 1168. The Eleventh Circuit has awarded attorneys' fees incurred in a successful non-dischargeability proceeding. *Transouth Financial Corp. of Florida v. Johnson*, 931 F.2d 1505, 1507-1508 (11th Cir. 1991). The Eleventh Circuit's ruling in *Transouth Financial* is especially telling because non-dischargeability proceedings are used as an example by the Ninth Circuit in *Fobian* of proceedings which involve issues peculiar to federal bankruptcy law for which fees would *not* be awarded. *Fobian*, 951 F.2d at 1153. *Fobian* is even at odds with another Ninth Circuit ruling, *In Re J.F. Hink & Sons*, 815 F.2d 1314 (9th Cir. 1987), in which fees were awarded in a dispute arising under Section 365 of the Bankruptcy Code, which is one of the few substantive sections of the Bankruptcy Code that truly is peculiar to federal bankruptcy.

In addition, various district courts and bankruptcy courts have allowed a creditor to recover its post-petition attorneys' fees as part of its unsecured claim. *See, e.g., Liberty National Bank v. George*, 70 B.R. 312 (W.D. Ky. 1987) (claim for contractual attorneys' fees above the value of an oversecured creditor's collateral should be allowed as an unsecured claim); *In re Ladycliff College*, 56 B.R. 765 (S.D.N.Y. 1985) (award of post-petition fees under collection clause in contract as unsecured claim is not erroneous or contrary to law).

The conflict between the Ninth Circuit and these other courts cannot be permitted. Consistency among courts in a national bankruptcy system is of prime importance. Unless this Court resolves the issue, the award of post-petition fees as part of allowed claims in a particular case would depend on the venue of the proceeding rather

than the uniform rule of law. To subject debtors and creditors in general to this confusion goes against the national bankruptcy system's purpose of providing an orderly and predictable framework for resolution of bankruptcy claims.

IV.

THE NINTH CIRCUIT'S PER SE RULE DISTURBS THE DELICATE BALANCE OF POWER IN BANKRUPTCY PROCEEDINGS AND CREATES CONFUSION AS TO THE AWARD OF ATTORNEYS' FEES AS PART OF CREDITORS' CLAIMS IN BANKRUPTCY ACTIONS

The Ninth Circuit acknowledged that, "where a contract or statute provides for an award of attorneys' fees, a creditor may be entitled to such fees in bankruptcy proceedings. Such an award is governed by state law." *In re Fobian*, 951 F.2d at 1153. When claims are determined in bankruptcy, the debtor's and trustee's attorneys' fees are paid out of the *estate*. 11 U.S.C. § 330(a)(1) and 503(b)(2). The creditors' fees are borne by the individual creditor unless there is a contractual provision stating otherwise. If there is such a contractual attorneys' fee provision, state law governs its effect.

In *Fobian*, however, the Ninth Circuit created a *per se* federal rule which departs from this traditional understanding and intrudes upon the delicate balance of power between creditors and debtors. Before the broad rule announced in *Fobian*, if there was a contractual attorneys' fees clause, a creditor's attorneys' fees could become part of the creditor's allowed claim against the estate, and therefore the economic cost of litigation was borne, in part, by the estate. After *Fobian*, debtors and trustees

need not take the fees incurred by creditors into account when determining their strategy, because the creditor's costs do not become a claim against the estate if the issues litigated are "peculiar to federal bankruptcy law." Likewise, creditors may be forced to accept terms less favorable that the Bankruptcy Code would require because of the unrecoverable expense of challenging illegal reorganization plans such as the plan rejected by both the Bankruptcy Appellate Panel and the Ninth Circuit in *Fobian*.

Equally damaging is the new uncertainty created by the Ninth Circuit's decision that the issues under Sections 506 and 1225 before the court in *Fobian* were "issues peculiar to federal bankruptcy law." Petitioner did not initiate either the Chapter 12 case or the plan dispute; the Debtor's Chapter 12 plan proposed to strip the Petitioner of part of its claim and Petitioner simply defended its contractual claim. Essentially every action by a creditor in a bankruptcy is *both* an effort to enforce its contract (which is a claim under Section 506) *and* to resolve a bankruptcy issue, yet *Fobian* provides no guidance to courts or litigants as to what types of activity results in the award of recoverable fees. The Ninth Circuit's broad holding demonstrates the danger in having the award of attorneys' fees turn upon a court's decision as to whether that issue is "peculiar to federal bankruptcy law."

The national bankruptcy system cannot operate properly within this confusion. Courts and litigants should not be forced in every case to determine whether a particular issue is peculiar to bankruptcy law. Debtors and creditors should not be placed in a position where they cannot determine if attorneys' fees will become part of

the creditors' allowed claim. And, finally, the delicate balance of power between debtors and creditors inherent in the Bankruptcy Code, which generally leads to settlement of claim disputes, should not be changed without an analysis of the statutory policies behind awards of attorneys' fees as part of creditors' claims and the enforcement in bankruptcy of contracts, valid under state law, providing for their recovery.

V.

SECTION 506(b) OF THE BANKRUPTCY CODE DOES NOT PROHIBIT THE ALLOWANCE OF AN AWARD OF ATTORNEYS' FEES TO WESTERN FARM CREDIT BANK

A. Section 506(b) Does Not Prohibit An Undersecured Creditor From Adding Attorneys' Fees To The Unsecured Portion Of Its Claim.

The broad rule announced in *Fobian* makes no distinction whatsoever among fully secured claims, undersecured claims and unsecured claims. Some courts have held that because Section 506(b) provides for attorneys' fees to be made part of the *secured* claim of an *over*secured creditor, that is the only time attorneys' fees can be added to a claim. Undersecured and unsecured creditors are not entitled to add attorneys' fees incurred during bankruptcy proceedings to their claim, no matter what the contractual language. *See, e.g., In re Sakowitz, Inc.*, 110 B.R. 268, 275 (Bankr. S.D. Tex. 1989). This is an erroneous reading of the statute, and was in fact rejected by the Ninth Circuit in *Matter of 268 Ltd.*, 789 F.2d 674, 678 (9th Cir. 1986). The *Matter of 268 Ltd.* court wrote:

> "Our rejection of [Creditor's] construction of § 506(b) does not preclude it from seeking the contractual fees in excess of $20,000 as an unsecured claim. Section 506 establishes the requirements for a secured claim. Subsection (a) defines such claims. Subsection (b) states that under some circumstances 'there shall be allowed to the holder of such claim interest, fees, costs or charges. When read literally, subsection (b) arguably limits the fees available to the oversecured creditor. When read in conjunction with § 506(a), however, it may be understood to define a portion of the fees which shall be afforded secured status. We adopt the latter reading."

In re 268 Ltd., supra, 789 F.2d at 678. In ruling that fees may become part of the creditor's claim, the Ninth Circuit expressly acknowledged that Section 501 of the Bankruptcy Code "contemplates that undersecured creditors may pursue the unsecured portion of their claims as unsecured creditors." *Id.*

B. Given Fobian's Solvent Status, Western Farm Should Have A Claim For Its Attorneys' Fees.

Fobian is solvent. *Fobian,* 951 F.2d at 1150. When a debtor is solvent, courts have awarded unsecured creditors a claim for post-petition interest, despite the general rule to the contrary. *In re Walsh Construction, Inc.,* 669 F.2d 1325, 1330 (9th Cir. 1982) (pre-Bankruptcy Code Case). The Bankruptcy Code has provided that, where the debtor is solvent, post-petition interest on claims is available to creditors. 11 U.S.C. § 726(a)(5). Even courts which contend that undersecured and unsecured creditors are

not entitled to make attorneys' fees part of their unsecured claim have made an exception in the case of a solvent debtor. "This court is further of the opinion that attorneys' fees should be allowed where the Debtor is solvent (before and after the allowance) due to policy considerations akin to those with respect to the allowance of interest post-petition." *Sakowitz, supra,* 110 B.R. at 270; *see, In re Continental Airlines Corp., Inc.,* 110 B.R. 276 (Bankr. S.D. Tex. 1989) (awarding attorneys' fees to unsecured creditor of solvent debtor).

The broad, *per se* rule in *Fobian* makes no distinction between solvent and insolvent debtors. This failure to take Fobian's solvency into account is illustrative of the danger in announcing a broad rule that has no basis in the written language of the Bankruptcy Code and which has no guidelines for its implementation. The *Fobian* rule makes the orderly resolution of claims *less* likely rather than more likely, and introduces inconsistency into what should be a uniform system for bankruptcy cases.

CONCLUSION

Petitioner Western Farm Credit Bank prays that a writ of certiorari issue from this Honorable Court to review the judgment of the Court of Appeals for the Ninth Circuit in *In Re Fobian*. In the event that the petition is granted, Petitioner prays that the judgment of the Court of Appeals as to the award of attorneys' fees as part of Petitioner's claim be reversed and that the cause be remanded for proceedings consistent with this Court's ruling.

Respectfully submitted,

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APPENDIX A

In re Elmer FOBIAN and Elsie Fobian, Debtors.

Elmer FOBIAN and Elsie Fobian, Appellants,

v.

WESTERN FARM CREDIT BANK, Appellee.

No. 90-16313.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Nov. 6, 1991.

Decided Dec. 24, 1991.

Wayne B. Harbarger, III, Sacramento, Cal., for appellants.

Gloria M. Greene, Tennant, Greene & Dutra, Sacramento, Cal., for appellee.

Appeal from the Ninth Circuit Bankruptcy Appellate Panel.

Before FLETCHER, WIGGINS and KOZINSKI, Circuit Judges.

FLETCHER, Circuit Judge:

Elmer and Elsie Fobian appeal from the decision of the Bankruptcy Appellate Panel ("BAP") reversing the bankruptcy court's confirmation of their chapter 12 plan. They argue that the BAP erred in holding that the plan could not be confirmed because it did not meet the requirements of Section 1225 of the Bankruptcy Code.[1]

---

[1] Unless otherwise stated, all references to "sections" refers to the Bankruptcy Code, 11 U.S.C. § 101 et seq.

The Bank argues for affirmance of the BAP's decision, and asks that we award it attorneys' fees and costs.

We affirm the BAP's decision, but award the Bank only costs on appeal.

BACKGROUND

The Fobians are solvent Chapter 12 debtors. They are current on all obligations except a loan from the Bank. The Bank holds a promissory note secured by 70.5 acres of land located in Glenn County, California and stock in the Federal Land Bank Association of Northern California. After the Fobians filed their Chapter 12 petition, the Bank filed a Proof of Claim for $191,660.09. The Proof of Claim stated: "No security interest is held for this claim except Deed of Trust. Stock in FLBA of Northern California perfected pursuant to the Farm Credit Act of 1971." The Fobians made no objections to this Proof of Claim.

While the Fobians filed three plans, only the "First Amended Plan for Reorganization under Chapter 12" (the "Plan") was submitted for confirmation. The Bank filed objections to the plan and a confirmation hearing was held on June 27, 1989.

The Plan provided for treatment of the Bank's claim as follows:

> The "Distressed Property" consists of approximately 70.5 acres of rice land in Glenn County undersecured by a promissory note and deed of trust to FLB [the Bank] in the approximate sum of $190,000 (including interest and penalties). The Debtor also owes approximately 2 years real

> estate taxes to the County of Glenn on the property. The fair market value of the property is estimated by the Debtors to be $70,500.00. The Debtors would propose alternative treatments to the Secured Creditor.
>
> The first alternative is a refinancing of the debt and write-off of balance over the new principal of $70,500. The new obligation would carry 9.0% interest for a term of 40 years with annual payments beginning 12/31/90.
>
> The second alternative is that the Debtors will surrender the property pursuant to 11 USC 1225(a)(5)(C). Said surrender would be in full satisfaction of the amount allegedly due to the Secured Creditor.
>
> Under either alternative there would be *no* undersecured obligation owed to the secured creditor, no deficiency judgments and no net disposable payments to be made through the trustee. The Secured Creditor may elect their [sic] choice of alternative until the date and time set for the hearing on the Plan. If the Secured Creditor has not chosen their alternative by the date and time set for hearing on confirmation of the Plan, the Debtors may elect their choice of alternative.

The Bank did not elect either alternative. The Fobians then elected the second alternative, surrender of the property.

The Bank objected to confirmation of the Plan on the grounds that the plan did not take into consideration the unsecured portion of the Bank's claim, and did not comply with the requirements of Section 1225(a)(4). The Bankruptcy Court nonetheless confirmed the Plan in a

Memorandum Opinion and Order Including Findings of Fact and Conclusions of Law filed on August 7, 1989.

The BAP reversed, holding that because the Plan did not meet the requirements of Section 1225, it could not be confirmed.

STANDARD OF REVIEW

We review a bankruptcy court's conclusions of law *de novo*. Findings of fact are upheld unless they are clearly erroneous. *Rubin v. West (In re Rubin)*, 875 F.2d 755, 758 (9th Cir. 1989).

DISCUSSION

Because the Plan fails to comply in several ways with Section 1225, the BAP was correct in reversing the bankruptcy court's confirmation. We now analyze in some detail the treatment of the Bank's claim by the bankruptcy court and the Plan.

1. Section 506

In confirming the plan, the bankruptcy court stated that at the time of confirmation the extent to which the bank was secured was "uncertain." The bankruptcy court found that "it is clear that BANK has not yet become an unsecured creditor." Thus, the Bank could not invoke the protections Section 1225 provides for such claims. Looking in particular to description of the Bank's claim in the Plan itself, the BAP found that the bankruptcy court had erred in holding that the Bank held only a secured claim. The BAP was correct in this holding.

The BAP cited Section 506, which provides:

> (a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a). Section 506 required the bankruptcy court to determine whether the bank was both a secured and an unsecured creditor. Without doing so, the court could not apply the tests of Section 1225 to the plan.

II. Section 1225(a)(5)

The Fobians argue that the Bank has no unsecured claim under the plan as the Bank was offered the option of receiving the property securing its claim in full satisfaction of that claim. In support of this argument, the Fobians invoke Section 1225(a)(5), which provides:

> (a) Except as provided in subsection (b), the court shall confirm a plan if –
>
> > (5) with respect to each allowed secured claim provided for by the plan –
> >
> > > (C) the debtor surrenders the property securing such claim to such holder
> > >
> > > . . .

11 U.S.C. § 1225(a)(5).

As the Fobians note, cases have acknowledged the "theoretical possibility" of a surrender of property in satisfaction of a secured debt; however, such cases have also recognized that such a solution is unworkable in practical terms. Absent the provision of some additional protection to the creditor, it is impossible to ensure that the creditor will receive the full amount to which it is entitled, and only that amount. Surrender of the property may satisfy the secured claim. However, if the value of the property is less than the amount of the claim, the creditor may retain an unsecured claim for the difference. If the value of the property surrendered turns out to exceed the amount of the claim, the secured creditor receives a surplus to which it is not entitled. Thus, the court in *In re Durr* rejected a plan which provided for the transfer of real property in satisfaction of a secured claim. The *Durr* court noted that a plan "proposing a payment with tangible property" must provide both for a "surplus of value" or for a "margin of allowance" to ensure that the creditor received full value, and for a means of recapturing excess value the creditor might realize on disposition of the collateral. *In re Durr*, 78 B.R. 221, 225 (Bankr.D.S.D.1987). Because the plan at issue made no such provisions, it could not be confirmed. *Id., see also In re Indredland*, 77 B.R. 268, 274 (Bankr.D.Mont.1987) (approving plan which provided for transfer of property to secured creditor where the debtor had submitted a 5 year plan, and the creditor could return to the court for "redetermination of its claim" if it failed to realize the value of its claim on sale of the collateral).

In this case, the debtor's plan provides for neither the safeguard required by *Durr* nor the possibility of redetermination present in *Indreland*. While Section 1225(a)(5)

would extinguish the Bank's claim to the extent it was secured, the unsecured portion would survive.

III. Section 1225(a)(4)

Section 1225(a)(4) provides:

> (a) Except as provided in subsection (b), the court shall confirm a plan if –
>
> > (4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title under such date . . .

11 U.S.C. § 1225(a)(4).

Here, all parties acknowledged that the debtor had substantial net worth. Thus, in a chapter 7 liquidation, the Bank would be paid in full. However, the Plan makes no provision for the unsecured portion of the Bank's claim. Therefore, the Plan does not meet the requirements of Section 1225(a)(4). The BAP was correct in reversing confirmation for this reason.

IV. Section 1225(b)

Section 1225(b) provides:

> (b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan –

> (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
>
> (B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period, or such longer period as the court may approve under section 1222(c), beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

11 U.S.C. § 1225(b)(1).

Section 1225(b) does not provide an alternative to compliance with Section 1225(a); rather, each subsection must be satisfied independently. *In re Willingham,* 83 B.R. 552, 553 (Bankr.S.D.Ill.1988).

Here, the Plan provides for no payment to the Bank in satisfaction of its unsecured claim. It also fails to provide for any portion of the Fobians' income to be applied to payments to the Bank. Thus, the Plan fails to meet the requirements of Section 1225(b). The BAP was correct in reversing confirmation on these grounds.

V. Award of Attorneys' Fees and Costs to the Bank

The Bank asks for an award of attorneys' fees and costs. It cites provisions in the promissory note and the deed of trust executed in relation to the loan which provide for the payment of fees and costs incurred in collection of amounts due or enforcement of rights.

A. Costs on Appeal

Bankruptcy Rule 8014 provides, in relevant part: "Except as otherwise provided by law, agreed to by the parties or ordered by the district court or bankruptcy appellate panel, costs shall be taxed against the losing party on appeal." Bankruptcy Rule 8014. Thus, we award the Bank its costs on its appeals before the BAP and before this court.

B. Attorneys' Fees at all levels; Costs in the Bankruptcy Court

Where a contract or statute provides for an award of attorneys' fees, a creditor may be entitled to such fees in bankruptcy proceedings. Such an award is governed by state law. *Collingwood Grain, Inc. v. Coast Trading Co. (In re Coast Trading Co.)*, 744 F.2d 686, 693 (9th Cir.1984); *Merced Production Credit Ass'n v. Sparkman (In re Sparkman)*, 703 F.2d 1097, 1099 (9th Cir.1983).

However, where the litigated issues involve not basic contract enforcement questions, but issues peculiar to federal bankruptcy law, attorney's fees will not be awarded absent bad faith or harassment by the losing party. *Coast Trading*, 744 F.2d at 693 (refusing to award fees where creditor brought a nondischargeability action); *Grove v. Fulwiler (In re Fulwiler)*, 624 F.2d 908, 910 (9th Cir.1980) (refusing to award fees for creditor's action under Section 546); *see also Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 741-42 (9th Cir. 1985) (because creditor's request for relief from the automatic stay pursuant to Section 362(d) was not an "action on the contract,"

debtor was not entitled to attorneys' fees for defense against the request).

Here, litigation involved solely issues of federal bankruptcy law: the Bank sought proper application of Sections 506 and 1225. This was not a traditional "action on the contract." "[T]he question of the applicability of the bankruptcy laws to particular contracts is not a question of the enforceability of a contract but rather involves a unique, separate area of federal law." *Coast Trading*, 744 F.2d at 693. Thus, we decline to award the Bank attorneys' fees for its litigation of this case at all levels, and limit the award of costs to costs incurred on appeal.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: ELMER FOBIAN and ELSIE FOBIAN, Debtors,	
ELMER FOBIAN and ELSIE FOBIAN, Appellants, v. WESTERN FARM CREDIT BANK, Appellee.	No. 90-16313 BAP No. EC-89-1765 ORDER (Filed Feb. 4, 1992)

Before: FLETCHER, WIGGINS, and KOZINSKI, Circuit Judges,

The petition for rehearing is denied.

APPENDIX B

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re ELMER FOBIAN, ELSE FOBIAN, Debtors.	BAP NO. EC 89-1765 ROAs BK. NO. 288-07673-A-12 Memorandum (Filed Aug. 16, 1990)
WESTERN FARM CREDIT BANK Appellant, v. ELMER FOBIAN, ELSE FOBIAN, Appellees.	

Argued and Submitted on February 15, 1990
at Sacramento, California

Filed AUG 16 1990

Appeal from the United States Bankruptcy Court
for the Eastern District of California

Honorable Loren S. Dahl, Bankruptcy Judge, Presiding

Before: RUSSELL, OLLASON, and ASHLAND, Bankruptcy Judges.

Creditor Western Farm Credit Bank appeals from an order confirming the debtor's first amended plan of

reorganization.[1] The plan did not meet the requirements of 11 U.S.C. Section 1225 because it failed to provide for Western Farm Credit Bank's unsecured claim. WE REVERSE and REMAND.

I.

FACTS

The debtors, Elmer and Else Fobian (Fobians) are solvent Chapter 12 debtors having a net worth of approximately $480,000. The debtors are current on all obligations except a certain loan No. 236077-2 to Western Farm Credit Bank (Western). Western holds a promissory note for the principal sum of $155,000 secured by 70.5 acres of rice land located in Glenn County, California and stock in the Federal Land Bank Association of Northern California. Western filed a Proof of Claim for the amount owing, $186,864.18, on December 20, 1988. Approximately $80,000 of this is unsecured.[2] No objections were made to the Proof of Claim.

---

[1] According to the Fobian's valuation, the fair market value of the land is $70,500. According to Western's valuation, the fair market value of the land is $110,000.

[2] The court's "Memorandum Opinion and Order Including Findings of Fact and Conclusions of Law" was entered August 7, 1989. On August 17, 1989 Western Farm Credit Bank filed a Notice of Appeal "from the final Order of the Bankruptcy Court on the Creditor's Objections to Confirmation of the First Amended Plan as entered on August 7, 1989." The "Order of Confirmation of Debtor's Plan of Reorganization" was entered on August 25, 1989. It is clear that Western is appealing from the Order confirming the Debtor's plan.

The Fobians filed three plans, but only the "First Amended Plan for Reorganization Under Chapter 12" was submitted for confirmation (the plan) and is the subject of this appeal. Western filed objections to the plan and a confirmation hearing was held on June 27, 1989. Western objected to it's treatment as the Class 5 Creditor on the real property loan No. 236078-0.

The First Amended Plan of Reorganization provided for Western's Class V claim as follows:

> The "Distressed Property" consists of approximately 70.5 acres of rice land in Glenn county *undersecured* by a promissory note and deed of trust to FLB in the approximate sum of $190,000 (including interest and penalties). The Debtor also owes approximately 2 years real estate taxes to the County of Glenn on the property. The fair market value of the property is estimated by the debtors to be $70,500.00. The debtors would propose alternative treatments to the secured creditor.
>
> The first alternative is a refinancing of the debt and write-off over the new principal of $70,500. The new obligation would carry 9.0% interest for a term of 40 years with annual payments beginning 12/31/90.
>
> The second alternative is that the Debtors will surrender the property pursuant to 11 U.S.C. 1225(a)(5)(c). Said surrender would be in full satisfaction of the amount allegedly due to the Secured Creditor.
>
> Under either alternative there would be *no* under-secured obligation owed to the secured creditor, no deficiency judgments and no net disposable payments to be made through the

> trustee. The Secured Creditor may elect their choice of alternative until the date and time set for the hearing on the Plan. If the Secured Creditor has not chosen their alternative by the date and time set for hearing on confirmation of the Plan, the Debtors may elect their choice of alternative.

Appellants Excerpts, Exhibit T at 173.

Western objected to the plan on the grounds that it proposed to pay nothing on the unsecured portion of their claim. Western argued that under 11 U.S.C. Section 1225(a)(4) the court could confirm the Fobian's plan only if the value of the property received on their allowed unsecured claim was not less than the amount they would receive under a Chapter 7 liquidation. According to an updated financial statement of the debtors, the Fobians had a net worth of $481,000. Appellants Excerpts, Exhibit S at 121-122. Since the debtor is solvent, Western would be paid in full on the loan under a Chapter 7 liquidation.

The court confirmed the plan in a Memorandum Opinion and Order Including Findings of Fact and Conclusions of Law filed on August 7, 1989. The court found that Western was not an unsecured creditor at the time of confirmation of the plan, although it may become an unsecured creditor at some time in the future. At such a time, Western would have to then pursue collecting any deficiency on the loan. The court disallowed a declaration by Western's appraiser as to the value of the property and refused to determine whether Western had unsecured status because the hearing was not noticed as a valuation hearing. The court found that it was not necessary for the

plan to meet the requirements of Section 1225(a)(4) because Western was not an unsecured creditor.

II.

ISSUES

1. Whether the bankruptcy court erred in holding that Western Farm Credit Bank is not an unsecured creditor.

2. Whether the bankruptcy court erred in holding that 11 U.S.C. Section 1225 did not apply to confirmation of the plan.

III.

STANDARD OF REVIEW

Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed *de novo*. *Ragsdale v. Haller*, 780 F.2d 794, 794 (9th Cir. 1986); Bankr. R. 8013.

IV.

DISCUSSION

A. WESTERN FARM CREDIT BANK HAS AN ALLOWED UNSECURED CLAIM

Western filed a Proof of Claim for $186,864.18 on December 20, 1988. Section 502(a) provides:

> *Allowance of claims or interests.*
>
> (a) A claim or interest, proof of which is filed under section 501 of this title, is deemed

> allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title objects.

No objections were made to Western's Proof of Claim, therefore it is deemed allowed.

Section 506(a) provides:

> *Determination of secured status.*
>
> (a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . *and is an unsecured claim to the extent that the value of such creditor's interest* . . . is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or plan affecting such creditor's interest.

"Subsection (a) of this section separates an undersecured creditor's claim into two parts – he has a secured claim to the extent of the value of his collateral; he has an unsecured claim for the balance of his claim." 11 U.S.C. § 506(a), House Report (Reform Act of 1978) (Norton 1990).

Western contended in the trial court and reasserts here that its claim is secured for the value of the 70.5 acres of rice land, and unsecured for approximately $80,000. The bankruptcy court disagreed with Western:

> In this regard, the BANK's contention is incorrect. The BANK'S proof of claim filed herein shows that the loan is evidenced by a promissory note which contains language referring to a deed of trust of the same date on the Glenn County property. In fact the proof of claim states that the obligation is not only secured by the deed of trust but also stock in FLBA of Northern California. These facts are not disputed by the debtors. At the present point in time, the BANK may be oversecured, undersecured or exactly secured. Which, is yet unknown. The court only knows from the evidence before it that BANK is secured but not to what extent.

Appellants Excerpts, Exhibit J at 33.

The evidence before the court included a statement in the plan in which the debtor admits that Western is an undersecured creditor and that the fair market value of the property was $70,500. The court disallowed Western's evidence of a fair market value of $110,000, but under either figure Western has an unsecured claim of at least $80,000. Valuation of secured and unsecured claims at a hearing on confirmation of a plan is necessary for determining whether claims receive proper treatment in the proposed plan. *See In re Bremer*, 104 Bankr. 999 (Bankr. W.D. Mo. 1989); *In re Danelson*, 77 Bankr. 261 (Bankr. D. Mont. 1987).

Western's Proof of Claim states "[t]his claim is a general unsecured claim, except to the extent that the security interest, if any, described in paragraph 9 is sufficient to satisfy the claim." Paragraph 9 provides that "[n]o security interest is held for this claim except Deed

of Trust recorded 6/4/82; capital stock of FLBA of Northern California created and perfected pursuant to the Farm Credit Act of 1971." Appellant' Excerpts, Exhibit W at 196. No evidence of the value of the FLBA stock was presented. Additionally, it is not clear whether the stock would be available for surrender under the Farm Credit Act. *See In re Greseth*, 78 Bankr. 936, 942-43 (D. Minn. 1987).

There was no dispute at the trial that the value of the land was less than the debt it secured. Mr. Harbarger, counsel for the Fobians so stated at trial during the following colloquy:

> THE COURT: I guess Miss Greene [Counsel for Western] is saying that as to the amount that the property is worth, fair market value is less than the total amount of the debt. They are unsecured as to that amount, right.
>
> Is that what you're saying?
>
> MISS GREENE: Yes.
>
> THE COURT: What is your response to that?
>
> MR. HARBARGER: If we did a (b)(5) program, that would be true. But if we are in here arguing about what the fair market value of the land, Judge, the balance will be unsecured. The balance will be unsecured. Then it's right. But that's not one of the options the Debtor is giving the creditor.
>
> Either agree at this price or take it back. "I" or "I". We don't care. "I" is not one of the options. We don't want an unsecured creditor.

Appellant's Excerpts, Exhibit K at 51.

To hold that Western has only a secured claim ignores that plain language of Section 506(a). It is obvious that Western has an unsecured claim without determining to what extent. *See In re O'Farrell*, 74 Bankr. 421, 423 (Bankr. N.D. Fla. 1987) (Upon the court's valuation of property and the debtors' return of certain collateral to F.L.B. as proposed, any deficiency due F.L.B. shall be treated as an unsecured claim by the debtor's plan.)

We disagree with the bankruptcy court's conclusion that Western has only a secured claim and hold that as a matter of law, according to the plain language of Section 506(a), Western has both a secured and an unsecured claim. The issue of the extent of the unsecured claim is not before this Panel and we make no finding as such.

B. THE PLAN VIOLATES 11 U.S.C. SECTION 1225

Western alleges that it was improper for the bankruptcy court to confirm the Plan where it did not meet the requirements of Section 1225. Section 1225(a) sets forth the mandatory provisions for confirmation of the debtor's plan. Section 1225(a) provides in pertinent part:

> *Confirmation of plan.*
>
> (a) *Except as provided in subsection (b),* the court shall confirm a plan if –
>
> (4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed *unsecured* claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

(5) with respect to each allowed secured claim provided for by the plan –

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed by the trustee or the debtor under the plan on account of such claim is not less than the allowed amount of such claims; or

(C) the debtor surrenders the property securing such claim to such holder;

Western contends that the Plan does not meet the Section 1225(a)(4) "best interest" test. *See In re Nielsen*, 86 Bankr. 177 (Bankr. E.d. Mo. 1988) (surveying the interpretation and application of Section 1225(a)(4)). Under that subsection, the plan may only be confirmed if Western would receive not less under the plan than under a Chapter 7 liquidation. The evidence before the court was that the Fobians had a net worth of over $480,000, much of which were liquid assets.[3]

---

[3] The updated financial statement prepared by the Fobians and submitted to Western on March 1, 1988 and the testimony of Mr. Fobian at a 2004 examination on April 10, 1989 indicate that the Fobians had total assets of $875,450 and total liabilities of $394,000 for a net worth of $481,000. This evidence was before the bankruptcy court during the hearing on confirmation of the plan. Appellant's Excerpts, Exhibit S at 121-22.

Western's debt would be paid in full upon a Chapter 7 liquidation but the plan does not provide for any payment of the unsecured debt. A plan cannot be confirmed where the debtors have sufficient assets yet propose to pay nothing to the unsecured creditor because it does not satisfy Section 1225(a)(4). *In re Novak*, 102 Bankr 22, 23 (Bankr. E.D.N.Y. 1989) "A farmer's plan cannot be confirmed if it fails to comply with 11 U.S.C. § 1225(a)(4)." *In re Nielsen*, 86 Bankr. 177, 178 (Bankr. E.D. Mo. 1988).

Western correctly contends that as the holder of an allowed secured and unsecured claim, the surrender of the property alone extinguished only the secured claim. The Fobians attempt to strip Western of the protections afforded unsecured creditors by Section 1225(b).

However, Section 1225(a) is subject to subsection (b) which provides that:

> (b)(1) If the trustee or the holder of an allowed *unsecured* claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan –
>
> > (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
> >
> > (B) the plan provides that all of the debtor's projected income to be received in the three year period, or such longer period as the court may approve under section 1222(c), beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

Subsection (b) is separate from subsection (a) and sets forth an additional requirement that must be met if an unsecured creditor objects to confirmation of the plan. *In re Willingham,* 83 Bankr. 552 (Bankr. S.D.Ill. 1988). Neither requirement of Section 1225(b) was met by the plan. The property was less than the amount of Western's claim but there was no provision in the plan for any of the debtor's projected disposable income to be paid to Western.

"It is true Congress has exhibited a desire to keep the family farmer in operation, but *only* if the farmer complied with the standards set forth in Chapter 12, and in particular, section 1225." *In re Nielsen,* 86 Bankr. at 178.

The Fobian's plan failed to meet the mandatory requirements of Section 1225, therefore, we REVERSE the confirmation of the Plan.

V.

CONCLUSION

We hold that as a matter of law Western Farm Credit Bank has both an allowed secured and unsecured claim under 11 U.S.C. Section 506(a). The requirements of Section 1225 were violated where the solvent Chapter 12 debtor's plan failed to provide for the unsecured claim that Western holds. Therefore, WE REVERSE the confirmation of the debtor's plan.

APPENDIX C

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re	No. 288-07673-A-12
ELMER FOBIAN and ELSE FOBIAN,	Motion No.
	Date Filed: May 16, 1989
Debtor(s).	Of: Objection to Confirmation of First Amended Plan
	(Filed Aug. 7, 1989)

MEMORANDUM OPINION AND ORDER INCLUDING FINDINGS OF FACT AND CONCLUSIONS OF LAW

WESTERN FARM CREDIT BANK (BANK) filed objections on May 16, 1989, to confirmation of debtor's first amended plan (plan) in this Chapter 12 case. Hearings on the objections and on confirmation were held June 27, 1989. At the outset, the court advises counsel that post-hearing documents filed by the parties are not being considered.

The debtor's have two outstanding loans with BANK. The BANK concedes that the first loan is fully secured by the "Home Ranch", and the payments are current. The second loan (Glenn) which has an approximate balance of $190,000.00 is secured by rice land in Glenn County and is delinquent. The BANK objects to the proposed treatment of this loan in debtor's plan contending *inter alia* that the plan fails to address the unsecured

portion of Bank's claim under the Glenn loan. Bank contends that as to this loan it is secured for $110,000.00 and unsecured for $80,000.00. It also asserts other objections which will be discussed later herein but, first it is necessary to examine its contention that at present its Glenn loan is both secured and unsecured.

In this regard, the BANK'S contention is incorrect. The BANK's proof of claim filed herein shows that the loan is evidenced by a promissory note which contains language referring to a deed of trust given to secure its payment and is secured by a deed of trust of the same date on the Glenn County property. In fact the proof of claim states that the obligation is not only secured by the deed of trust but also stock in FLBA of Northern California. These facts are not disputed by the debtors. At the present point in time, the BANK may be oversecured, undersecured or exactly secured. Which, is yet unknown. The court only knows from the evidence before it that BANK is secured but not to what extent. Nor is a determination of that fact before the court *sub judice.* The BANK is apparently trying to "bootstrap" its contention by filing a declaration of LOUIS VENTURINI, a BANK employee, wherein he expresses an opinion of value of the subject collateral. This hearing on BANK's objections were in connection with a confirmation hearing. It was not noticed as a valuation hearing and accordingly the VENTURINI declaration, which would be seriously questioned in any event because of his bias and lack of demonstrated qualifications, will be disregarded. The BANK did not timely accept debtor's "first alternative" as set forth under Class 5 in the plan, hence the "second alternative" surrender of the property pursuant to 11 U.S.C.

§ 1225(a)(5)(C) becomes effective upon confirmation of the plan. Upon the debtors surrender of the Glenn property to BANK pursuant to 11 U.S.C. § 1225(a)(5)(C), steps can be taken by BANK as stated in 5 Collier on Bankruptcy, 15th Ed. ¶1225.02, page 1225-9,10, "If there is a deficiency remaining after the disposition of the surrendered collateral, the creditor would be entitled to an allowed unsecured claim for that amount. The debtor and creditor could also otherwise agree or the creditor could accept the collateral in full satisfaction of its claim."

From the foregoing, it is clear that BANK has not yet become an unsecured creditor. It may never. But if it does at some later time, it may then pursue its rights as such.

The BANK also objects contending that the plan does not comply with Bankruptcy Code Section 1225(a)(4). This is the "best interests" test to be invoked for the protection of unsecured creditors. Because BANK is not presently an unsecured creditor, it has no standing to make this objection.

Further, the BANK urges that the plan has not been proposed in good faith as required by Section 1225(a)(3). The court has read the 2004 examination of ELMER FOBIAN taken April 10, 1989, but finds nothing therein which would support a finding that the plan was not proposed in good faith. In short, admissible evidence is lacking to support this objection.

The last objection recites that the required 25-day notice of the confirmation hearing was not given. At the most the notice was insufficient by three days, depending on the applicability of FRCP 6(e). This does not appear to be an objection *per se* and at least as to this objecting

creditor, it apparently did not affect it, for its counsel presented its objections fully and timely.

This opinion shall constitute findings of fact and conclusions of law. The BANK's objections to confirmation are denied. Counsel for the debtors will submit an order of confirmation.

IT IS SO ORDERED.

DATED: AUG 7 1989

/s/ Loren S. Dahl
Chief Judge, United States
Bankruptcy Court

I certify that on AUG 7 1989, a copy of the foregoing Memorandum Opinion and Order was mailed to the following:

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Tennant, Parshall, Read & Dutra
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725 30th Street, Suite 212
Sacramento, CA 95816
(Atty for Debtors)

/s/ Nancy Williams

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Attorney for Debtor
ELMER FOBIAN and ELSE FOBIAN

IN THE UNITED STATES BANKRUPTCY COURT
IN AND FOR THE EASTERN DISTRICT
OF CALIFORNIA

In Re:	Case No. 288-07673-A-12
ELMER FOBIAN and ELSE FOBIAN Debtor	ORDER OF CONFIRMATION OF DEBTOR'S PLAN OF REORGANIZATION
	(Filed Aug. 25, 1989)

On June 27, 1989 at 2:00 p.m. in Department A, the Debtor's Plan of Reorganization was heard by the Honorable Loren Dahl. After considering the Debtor's Plan of Reorganization, written objections thereto, oral arguments by all interested counsel and the Trustee, the Court makes the following Order Confirming and Amending the Debtor's Plan of Reorganization:

1. Debtors herein are qualified as a Family Farmer to file a Chapter 12 within the meaning of 11 USC section 101 (17);

2. Debtors have complied with all notice requirements and has timely filed its Plan of Reorganization;

3. The Debtors Plan was proposed in good faith and complies with the provisions of Chapter 12 as and with all other applicable statutes and Rules of Court;

4. DISCHARGE OF DEBTOR:

Upon payment of the claims to the Class 1 creditors and payment of $2000.00 to the Chapter 12 trustee and execution of a quit claim deed to the Class 5 creditor, the Debtor shall be discharged.

5. PRIOR CLAIMS BARRED:

Since no adversary actions were filed within the statutory period, all claims which were listed and treated in the Debtor's plan of reorganization are forever barred from further action against the Debtor save those creditors and claims classified as class 3 creditors which may exercise their contractual rights in the event of default if they do not conflict with applicable state law.

6. CLASS 1 CLAIMS:

The Debtors shall pay to the class 1 creditors their billings upon presentation and without further Order of this Court.

7. CLASS 2 CREDITOR:

The Debtor's counsel shall transmit a check held in trust for the trustee in the amount of $2,000.00 to the trustee upon receipt of an endorsed Order of Confirmation.

8. CLASS 3 & 4 CREDITOR:

The Debtor shall maintain the obligation in a current condition.

9. CLASS 5 CREDITOR:

The Debtor shall execute a Quit Claim Deed to the real property to the lienholder, Western Farm Credit Bank. The property as tendered shall constitute full satisfaction of the indebtedness owed to Class 5 Creditor on the real property loan no. 236078-0.

10. UNSECURED CREDITORS:

The Debtors have no unsecured creditors.

11. RETENTION OF JURISDICTION:

The Court shall retain jurisdiction to determine:

(a) allowance or disallowance of claims;

(b) determination of professional compensation;

(c) such other matters as the Debtor may bring before the Court.

12. EFFECTIVE DATE OF THE PLAN:

The effective date of the Plan shall be 30 days after the execution of the ORDER OF CONFIRMATION of the Plan.

DATED: AUG 25 1989

LOREN S. DAHL
LOREN S. DAHL
U.S. BANKRUPTCY JUDGE

(2)

Supreme Court, U.S.
FILED
JUN 3 1992
OFFICE OF THE CLERK

No. 91-1747

In The

Supreme Court of the United States

October Term, 1991

WESTERN FARM CREDIT BANK,

Petitioner,

vs.

ELMER FOBIAN and ELSE FOBIAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

The jurisdiction of the United States Supreme Court is properly invoked under 28 U.S.C. § 1254(1).

REASONS FOR DENYING THE WRIT

The main rationale presented by the petitioner in the writ of certiorari is that there exists a conflict between the Circuit Courts of Appeals which mandates that this Court resolve the conflict. The petitioner attempts, in the petition, to establish a conflict between the Second, Sixth and Eleventh Circuits and the Ninth Circuit with regard to the awarding of contractual attorney fees in bankruptcy cases. As indicated below, the alleged conflict is non-existent.

The petitioner has also attempted to show a conflict within the Ninth Circuit Court of Appeals which is non-existent.

The petitioner has requested this Court to judicially legislate an exception to the bankruptcy code which would allow contractual attorney fees to successful litigants under applicable state law. That request is inappropriate.

I.

BACKGROUND

In federal bankruptcy law, there is no statutory authority for award of attorney fees based on a contractual relationship of the parties. *See In re Martin*, 761 F.2d 1163 (5th Cir. 1985); *Transouth Financial Corp. of Florida v. Johnson*, 931 F.2d 1505 (11th Cir. 1991); *In re Jordan*, 927 F.2d 221 (5th Cir. 1991). Congress has specifically codified two (2) circumstances for the award of attorney fees to a party.

The creditor's provision, 11 U.S.C. § 506(b), allows an award of attorney fees to oversecured creditors, up to the limit of the value of their collateral.

> (b) To the extent that an allowed claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there should be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

A debtor may be awarded attorney fees, pursuant to 11 U.S.C. § 523(d), if the debtor prevails in non-dischargeability litigation, brought under 11 U.S.C. § 523(a)(2), regarding a consumer debt.

> (d) If a creditor requests a determination of dischargeability of a consumer debt under section (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

Additionally, the Bankruptcy Court has the general inherent power to punish the behaviors of bad faith or harassment with an award of attorney fees. *In re Fulweiler*, 624 F.2d 908 (9th Cir. 1980).

This petitioner is asking the Court to use *In re Fobian*, 951 F.2d 1149 (9th Cir. 1991) to judicially create new law which would (1) allow all creditors to obtain attorney fees from the debtor for participating in a debtor's chapter 11 case; (2) allow attorney fees on unsecured claims; and (3) allow successful creditors their

attorney fees in non-dischargeability actions (Petitioner's Petition, 13-18). For the same reasons that Congress has refused to write the requested bankruptcy provisions, despite vigorous lobbying of the institutional lenders, this Court should avoid judicial legislation. The bankruptcy code is designed with a very delicate balance to allow neither the debtor nor creditor the leverage to force a compromise against its best interests. The insertion by Congress of the two code provisions allowing attorney fees was designed to prevent historical abuses by the debtors and creditors. The lack of reciprocal attorney fees in § 523(d) was intentional. *In re Martin, supra*. Congress has achieved a balance of power which should not be judicially disturbed.

II.

SUMMARY OF CIRCUIT COURT CASES ALLEGED IN CONFLICT

The petitioner has pointed to several Circuit Court cases which have allowed the contractual rights of the parties to supersede the federal bankruptcy law. The petitioner indicates that these cases are in conflict with *Fobian* and, therefore, there needs to be a resolution of the conflicting Circuits. The following summary of the Circuit Court cases is offered to show the lack of conflict among the Circuits and illustrate the difference between *Fobian* and the cases offered as conflicting. The respondent has added the Fifth Circuit case of *Jordan, supra*, as it is identical to the Sixth and Eleventh Circuit cases.

A. Ninth Circuit — *In re Fobian*, 951 F.2d 1149 (9th Cir. 1991)

Fobian is a Ninth Circuit Court of Appeals case relating to confirmation of a Chapter 12 plan. The sole issue before the Bankruptcy Court was whether, under § 1225(a)(5)(C), the debtor must pay an undersecured claim if it surrenders the collateral for

a loan. The validity of the contract was not in question nor was the alleged amount of the claim or the various components thereof. The issue was (and is) one of first impression and the Bankruptcy Court found in favor of the debtor. The appellate courts reviewing the matter assumed an undersecured claim and reversed the Bankruptcy Court. The Ninth Circuit Court found that the § 1225(a)(5)(C) issue was one solely of interpretation of a federal bankruptcy code section and did not award attorney fees to the creditor (Western Farm Credit Bank).

The petitioner correctly states that *Fobian* is illustrative of the prior decisions of the Ninth Circuit and stands for the rule first enunciated in *Aleyska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975), that "with the exception of small amounts allowed under section 1923, the rule 'has long been that attorney fees are not ordinarily recoverable. . .' " (citing *Fleischman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 at 717). The rule as restated in *Fobian* is

> . . . where the litigated issues are not basic contract enforcement questions, but issues peculiar to federal bankrupcy law, attorney fees will not be awarded absent bad faith or harassment by the losing party.

The Ninth Circuit has previously described the bais for the rule of non-applicability of contractual attorney fees as *espressio unius est exclusio alterius*. This maxim of statutory construction means that "the expression of one thing is the exclusion of another". *In re Sakowitz*, 110 Bankr. 268 (S.D. Tex. 1989). The awarding of attorney fees rule is one peculiarly within the function of Congress, not the federal courts, and Congress has not deemed it appropriate to allow contractual attorney fees to be awarded in bankruptcy cases.

The cases described as in conflict by the petitioner are briefly described below. As the Court will recognize, the cases are not only not in conflict but not even dealing with the same issue.

B. Second Circuit — *In re United Merchants and Manufacturers, Inc.*, 674 F.2d 134 (2d Cir. 1982)

United Merchants is a Bankruptcy Act case which allowed the contractual award of attorney fees to two unsecured creditors, Two lenders had loaned the debtor $45,000,000 in unsecured loans. The case arose from an objection to the claims of the lenders by the Chapter 7 trustee to the "collection costs" and liquidated damages clauses requested by the two unsecured creditors. The Second Circuit Court of Appeals decided that there was no statutory bar to contractual fees or liquidated damages under the Act and since the creditor presumably bargained for the right to receive its "collection costs" or liquidated damages, the creditor was entitled to the benefit of its bargain. The case revolved around the equal bargaining power of the debtor and the creditor. The court indicated through dicta, that the new "Code" had no prohibition against the award of attorney fees as part of a claim to unsecured claims

C. Fifth Circuit — *In re Jordan*, 927 F.2d 221 (5th Cir. 1991)

Jordan is a case under § 523(a)(2)(B) relating to non-dischargeability of debt because of a false financial statement to a lender. The Fifth Circuit Court of Appeals affirmed the District Court's and Bankruptcy Court's decision that the debt was non-dischargeable and awarded the creditor its attorney fees incurred in the adversary action. The court found that although the creditor had no statutory basis for attorney fees under § 523(d), the creditor is entitled to contractual attorney fees because the Code only envisions discharging debts of "honest debtors."

D. Sixth Circuit — *In re Martin*, 761 F.2d 1163 (5th Cir. 1985)

Martin is another case involving non-dischargeability of a claim based upon § 523(a)(2)(B). The debtor had filed a false financial statement to obtain two loans with Bank of Germantown. Less than three months after receiving the second loan, the debtors filed a Chapter 7 petition. The bank filed an adversary action for non-dischargeability which was successful. The Sixth Circuit Court of Appeals allowed the Bank its contractual attorney fees because the successful creditors are allowed their attorney fees as part of their bargained for contractual rights.

E. Eleventh Circuit —*Transouth Financial Corporation of Florida v. Johnson*, 931 F.2d 1505 (11th Cir. 1991)

Transouth is the third case under § 523(a)(2) (non-dischargeability of a claim based on fraud) which was resolved by a written stipulation. The stipulation required the debtor to repay all of the principal, accrued interest and the attorney fees and costs of the creditor incurred in the collection of the promissory note executed by the debtor. The note contained an attorney fees provision which was permissible under Florida state law. The case, contrived by the creditor to put the issue before the Eleventh Circuit Court of Appeals, was argued without opposition. On a split decision, the Eleventh Circuit held that a successful creditor in a non-dischargeability action may recover contractual attorney fees because the debtor was not an "honest debtor." The court stated at page 1508,

> Fraudulent conduct is best discouraged, not only by . . . [recognizing that] the creditor who has been defrauded is entitled to all of its rights under the contract, including reasonable attorney fees . . . . (citing several cases).

The cases of the Fifth, Sixth and Eleventh Circuits involved dishonest debtors who were found to have fraudulently obtained money from lenders pursuant to non-dischargeability actions. The Courts found that the debtors should not, as a general policy, be entitled to escape the additional penalty of imposition of the creditors attorney fees and costs because they were not "honest debtors." In *United Merchants, supra*, the Second District case, the court did not find misconduct but felt that the relatively equal bargaining power and the sophistication of the parties validated the contractual "collection costs" clause contained in the contract.

In contrast, Mr. and Mrs. Fobian are small farmer debtors who had advanced a previously untried federal bankruptcy legal theory which was successful at the trial level and unsuccessful at the appellate level. There has never been an allegation of any misconduct on the part of Mr. and Mrs. Fobian. There is no question of the unequal bargaining power of the Western Farm Credit Bank (formerly known as the Federal Land Bank) and Mr. and Mrs. Fobian. The cases described as in conflict are inapposite. The *Fobian* case is inappropriate for the purposes of making the law requested by the petitioner.

III.

THE NINTH CIRCUIT IS NOT INCONSISTENT WITH ITSELF.

The Ninth Circuit Court of Appeals opinion of *In re J.F. Hink & Son*, 815 F.2d 1314 (9th Cir. 1987), is consistent with the Fifth, Sixth and Eleventh Circuits and is not inconsistent with the *Fobian* opinion. In *Hink, supra,* the Ninth Circuit awarded contractual attorney fees to the trustee when a party attempted to repudiate its post petition contract to purchase a lease from a bankruptcy estate. The defense offered by the offending party was lack of notice of a renegotiation of rent clause in the assumed

lease. The Ninth Circuit was acerbic in its decision when it stated:

> The transcript of the hearing before the bankruptcy Court makes plain beyond doubt, cavil or argument that the terms of the garage lease were well understood by Cukierman and his counsel . . .

The Court awarded the trustee

> . . . the costs and attorneys fees it has incurred at every stage of this proceeding from the beginning of its motion in the bankruptcy Court to clarify the July 12, 1985 motion.

When a party, debtor or not, attempts to act in a manner to abuse the bankruptcy Court process, the Ninth Circuit has penalized the offending party with the costs of litigation, including the attorney fees of the innocent party(ies).

IV.

THE UNITED STATES SUPREME COURT HAS PREVIOUSLY DENIED JUDICIALLY CREATED ATTORNEY FEES PROVISIONS.

This Court has previously made a determination of an analogous issue in *Alyeska, supra*, when Justice White wrote,

> we need labor the point no further. It appears that the rule suggested here and adopted by the Court of Appeals (the private attorney general theory) would make major inroads on a policy matter that Congress has reserved for itself. Since the approach taken by Congress to this issue (awarding of

> attorney fees) has been to carve out specific exceptions to a general rule that federal Courts cannot award attorney's fees beyond the limits of 28 USC 1923, those Courts are not free to fashion drastic new rules with respect to the allowance of attorney's fees to the prevailing party in federal litigation, or to pick and choose among plaintiffs and the statutes under which they sue and to award attorney fees in some cases but not in others, depending upon the Courts' assessment of the importance of the public policies involved in particular cases. . . .

The request of the petitioner for this Court to use *Fobian* to allow the award of contractual attorney fees in bankruptcy cases is a request for judicial legislation. This request is without merit.

CONCLUSION

The petitioner has attempted to show a conflict between the Circuit Courts of Appeal which is non-existent. The petitioner has falsely alleged a conflict within the reported decisions of the Ninth Circuit regarding the awarding of contractual attorney fees. The petitioner is requesting this Court to judicially create an exception to the bankruptcy code which would endanger the delicate balance of financial leverage between the debtors and creditors created by Congress.

There is no adequate justification for the granting of a writ of certiorari in this case. The petition should be denied.

Respectfully submitted,

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Counsel of Record
LAW OFFICE OF
WAYNE B. HARBARGER, III
Attorney for Debtors/Respondents

SUPREME COURT, U.S.
FILED
JUN 2 1992
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No. 91-1747

In The

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Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE *AMICUS CURIAE* APPLICANTS (SEE ATTACHED LIST) IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Amicus Curiae Applicants

1. Associated General Contractors of California, Inc. ("AGC"), is a nonprofit trade association organized under the laws of the State of California. AGC has approximately 700 contractor members who act as general contractors and subcontractors on both public and private construction projects. AGC also maintains an associate membership category, which includes approximately 750 businesses which perform specialized services for the construction industry in California. AGC is informed and believes that its contractor members perform the majority of the non-residential construction in the State of California, including public works construction governed by the prevailing wage requirements of the California Labor Code.

2. Campbell Construction Company is a California corporation, headquartered in Sacramento, California.

3. The Chase Manhattan Bank, N.A., is a national banking association, headquartered in New York, New York.

4. GE Capital – Private Label Bankruptcy Operation is a national private label financing operation, headquartered in Orange, California.

5. Stockmans Bank of Commerce is a California State Bank, headquartered in Elk Grove, California.

6. Tri Counties Bank is a California State Bank, headquartered in Chico, California.

7. Tri State Livestock Credit Corporation is a California lending institution, headquartered in Sacramento, California.

Amicus curiae applicants listed below as Nos. 8 through 36 are federal instrumentalities and members of the Farm Credit System. They are farmer owned and

managed cooperatives that provide funding to American farmers, ranchers, and harvesters of aquatic products.

8. AgriBank, FCB, successor of the Farm Credit Banks of St. Paul and St. Louis, headquartered in St. Louis, Missouri, serving agricultural borrowers in Illinois, Missouri, Arkansas, Michigan, Wisconsin, Minnesota and North Dakota;

9. Arizona Agricultural Credit Association, headquartered in Tempe, Arizona, serving agricultural borrowers in Arizona;

10. Central Coast Federal Land Bank Association, FLCA/Central Coast Production Credit Association, headquartered in Arroyo Grande, California, serving agricultural borrowers in the central coast region of California;

11. Central Valley Production Credit Association, headquartered in Turlock, California, serving agricultural borrowers in the central valley region of California;

12. Colonial Farm Credit, ACA, headquartered in Mechanicsville, Virginia, serving agricultural borrowers in the area;

13. Eastern Idaho Agricultural Credit Association, headquartered in Pocatello, Idaho, serving agricultural borrowers in twenty-four counties in Southern and Eastern Idaho and two counties in Wyoming;

14. Farm Credit Bank of Spokane, headquartered in Spokane, Washington, serving agricultural borrowers in Washington, Oregon, Montana, Idaho and Alaska;

15. Farm Credit Bank of Springfield/Springfield Bank for Cooperatives, headquartered in Springfield, Massachusetts, serving agricultural borrowers in Maine, New Hampshire, Vermont, Massachusetts, Rhode

Island, Connecticut, New York and New Jersey, serving agricultural cooperatives throughout the United States of America;

16. Farm Credit of the Connecticut Valley, ACA, headquartered in White River Junction, Vermont, serving agricultural borrowers in the area;

17. Farm Credit of North Central Jersey, ACA; Farm Credit of South Jersey, ACA; Farm Credit of Rancocas, ACA; headquartered in New Jersey, collectively serving agricultural borrowers in New Jersey;

18. Farm Credit of North Central New York, ACA, headquartered in Morrisville, New York, serving agricultural borrowers in the north central region of New York;

19. Farm Credit of Western New York, ACA, headquartered in Batavia, New York, serving agricultural borrowers in the western region of New York;

20. Federal Intermediate Credit Bank of Jackson, headquartered in Jackson, Mississippi, serving agricultural borrowers in Alabama, Mississippi and Louisiana;

21. Federal Land Bank Association of Hawaii, headquartered in Honolulu, Hawaii, serving agricultural borrowers in Hawaii on behalf of its principal, Petitioner Western Farm Credit Bank;

22. Federal Land Bank Association of Kingsburg, FLCA, headquartered in Kingsburg, California, serving agricultural borrowers in the area;

23. Federal Land Bank Association of Visalia, FLCA; Federal Land Bank Association of Bakersfield; Production Credit Association of Visalia and Production Credit Association of Bakersfield, headquartered in Visalia, California, collectively serving agricultural borrowers in the area;

24. Federal Land Bank Association of Yosemite, FLCA, headquartered in Turlock, California, serving agricultural borrowers in the area;

25. First South Production Credit Association, headquartered in Jackson, Mississippi, serving agricultural borrowers in the area;

26. Fresno-Madera Production Credit Association, headquartered in Fresno, California, serving agricultural borrowers in the area;

27. Hawaii Production Credit Association, headquartered in Honolulu, Hawaii, serving agricultural borrowers in Hawaii;

28. Hudson Valley Farm Credit, ACA, headquartered in Albany, New York, serving agricultural borrowers in the area;

29. Intermountain Federal Land Bank Association, FLCA; Sierra Nevada Production Credit Association, headquartered in Reno, Nevada, collectively serving agricultural borrowers in Nevada and northeast California;

30. Mohawk-Schoharie Farm Credit, ACA, headquartered in Fultonville, New York, serving agricultural borrowers in the area;

31. Northern California Federal Land Bank Association, FLCA; Northern California Production Credit Association, headquartered in Chico, California, collectively serving agricultural borrowers in the area;

32. Northwest Farm Credit Services, ACA, headquartered in Spokane, Washington, serving agricultural borrowers in Washington, Oregon, Montana, Idaho and Alaska;

33. Pacific Coast Farm Credit Services, ACA, headquartered in Windsor, California, serving agricultural borrowers in the area;

34. Sacramento Valley Production Credit Association, headquartered in Woodland, California, serving agricultural borrowers in the area;

35. Sierra Bay Federal Land Bank Association, FLCA; Sierra Bay Production Credit Association, headquartered in Stockton, California, serving agricultural borrowers in the area;

36. Susquehanna Valley Farm Credit, ACA, headquartered in Oneonta, New York, serving agricultural borrowers in the area.

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STATEMENT OF INTEREST OF *AMICUS CURIAE* APPLICANTS

Pursuant to Rule 37 of the rules of this Honorable Court, the applicants listed above respectfully submit this brief as *amicus curiae* in support of WESTERN FARM CREDIT BANK's (the "BANK") Petition for Writ of *Certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in *In re Fobian*, 951 F.2d 1149 (9th Cir. 1991).

The *amicus curiae* applicants are vitally interested in the proper disposition of this case in that it raises a current issue of broad importance to them and the industries they represent. They are concerned that *Fobian* will increase uncertainty in bankruptcy proceedings, create unnecessary and costly litigation, encourage forum shopping, and provide windfalls to solvent debtors at the expense of creditors.

ARGUMENT

I.

THE BANK IS ENTITLED TO ATTORNEYS' FEES UNDER STATE LAW AND MAY PROPERLY CLAIM SUCH FEES IN BANKRUPTCY

The BANK has an allowable claim for attorneys' fees against the solvent Respondents, ELMER and ELSE FOBIAN (the "FOBIANS"), pursuant to the attorneys' fees provisions in the Note and Deed of Trust.[1] *See, e.g., In*

[1] The promissory note executed by the FOBIANS in favor of the BANK provides:

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the Matter of Sparkman, 703 F.2d 1097, 1099 (9th Cir. 1983). It is well established that the validity of a claim in bankruptcy must be determined according to state law. The Bankruptcy Code ("Code") defines a claim as a right to payment, 11 U.S.C. Section 101(5)(A), and requires the court, upon objection, to disallow claims to the extent that they are unenforceable under any agreement or applicable law. 11 U.S.C. Section 502(b)(1).[2] Furthermore,

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> Each of the undersigned . . . agrees to pay reasonable attorneys' fees and costs incurred in collection of payment due, or in the enforcement of any right or remedy hereunder.

The deed of trust executed by the FOBIANS in favor of the BANK also contains a provision for attorneys' fees. The deed of trust provides:

> (3) Beneficiary may . . . (b) appear in and litigate any matters, *including condemnation and bankruptcy proceedings*, affecting the security of lien, and may incur necessary costs, expenses and attorneys' fees therefor . . . which advances, together with interest accrued thereon shall be immediately due and payable. . . . (Emphasis added.) See BANKS's Petition for Writ of *Certiorari*, page 7.

[2] This section provides as follows: "(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount except to the extent that –

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the construction of a clause in a note or mortgage providing for attorneys' fees is a matter of state law. *See Security Mortgage Co. v. Powers*, 278 U.S. 149, 153-154, 49 S.Ct. 84, 73 L.Ed. 236, 240 (1928); *In re Morris*, 602 F.2d 826, 829 (8th Cir. 1979); *In re Atlanta International Raceway Inc.*, 513 F.2d 546, 548 (5th Cir. 1975); *In re Eastview Estates II*, 713 F.2d 443, 447 (9th Cir. 1983); *In re Sparkman, supra*, 703 F.2d at 1099 (9th Cir. 1983); *Transouth Financial Corp. of Florida*, 931 F.2d 1505, 1507 (11th Cir. 1991); *In re United Merchants*, 674 F.2d 134, 137 (2nd Cir. 1982); *In re Martin*, 761 F.2d 1163, 1168 (6th Cir. 1985); *In re Banks*, 31 B.R. 173, 175 (Bkrtcy. N.D. Ala. W.D. 1982); *In re Foster*, 38 B.R. 639, 642 (Bkrtcy. M.D. Tenn. 1984).

The Supreme Court has held that property rights, created and defined by state law, are to be respected in bankruptcy absent express language in the Code to the contrary. *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed. 2d 136 (1979).[3] There is no express language in the Code that prohibits an unsecured or undersecured creditor to claim post-petition attorneys' fees as part of its claim. Under 11 U.S.C. Section 506(b) the Court may determine whether the claim for fees shall be allowed as part of the secured claim. Section 506(b)

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> (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law . . . "

[3] Although the property right in the *Butner* case is not a contractual claim for attorneys' fees but a mortgagee's claim to rents and profits, the term *property right* includes an unsecured debt (see *Lawrence T. Lasagna, Inc. v. Foster*, 609 F.2d 392, 394 (9th Cir. 1979)) and the term *debt* is defined as *liability on a claim*. 11 U.S.C. Section 101(12).

does not address whether an unsecured or undersecured creditor has a claim for attorneys' fees as part of its unsecured claim. The statutory basis for the allowance of these fees is provided for in 11 U.S.C. Sections 101(5)(A) and 502(b).

The Supreme Court in *Butner* stated as follows:

> Unless some federal interest requires a different result, there is no reason why such [property] interest should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both State and federal courts within a state serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.' (Citations) . . . [F]ederal . . . bankruptcy courts should take whatever steps are necessary to ensure that the creditor is afforded in federal court the same protection it would have under state law if no bankruptcy had ensued.

William E. Butner v. United States, supra, 440 U.S. 48, 55-56, 99 S.Ct. 914, 59 L.Ed.2d 136, 142.

Under California law, the BANK's claim for attorneys' fees would be allowed. California Code of Civil Procedure Section 1021 provides the basic right for such fees. The statute reads:

> Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties . . .

Under this statute, the allocation of attorneys' fees is left to the agreement of the parties. There is nothing in the statute that limits its application to contract actions

alone. *See Anthony Xuereb v. Marcus & Millichap, Inc.*, 3 Cal. App. 4th 1338 (1992). In the *Xuereb* case, the jury was presented with issues involving negligence, products liability and fraud. In addition, Plaintiff requested attorneys' fees pursuant to a purchase agreement which contained the following attorneys' fees clause:

> If this Agreement gives rise to a lawsuit or other legal proceeding between any of the parties hereto, including Agent, the prevailing party shall be entitled to recover actual court costs and reasonable attorney's fees in addition to any other relief to which such party may be entitled.

Id. at 1340.

The court granted the Plaintiff's request for attorneys' fees stating that "Code of Civil Procedure Section 1021 provides the basic right for attorneys' fees . . . " The *Xuereb* court further stated:

> Under this statute, the allocation of attorney fees is left to the agreement of the parties. There is nothing in the statute that limits its application to contract actions alone. It is quite clear from the case law interpreting Code of Civil Procedure section 1021 that parties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract. (Citations.)

Id. at 1341.

In the *Fobian* case, the parties expressly agreed that the BANK was authorized to litigate matters in bankruptcy proceedings to collect the debt and that these fees shall be immediately due and payable, together with the original debt. Under California law, the BANK has a property right to the payment of its reasonable attorneys'

fees incurred in litigating any matters in this bankruptcy proceeding. This determination is reinforced by the "American Rule" that attorneys' fees are properly awarded to a prevailing party in federal court if there exists a statute or valid contract that provides for them. *See Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717, 87 S.Ct. 1404, 1407, 18 L.Ed.2d 475, 478 (1967), and *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240, 257, 95 S.Ct. 1612, 44 L.Ed.2d 141, 153 (1975).

Furthermore, allowing the BANK its claim for reasonable fees against the solvent FOBIANS does not conflict with any other section of the Code, or with the fundamental bankruptcy principles of providing a fresh start to the debtor and fair treatment to all creditors.

II.

GIVEN THE FOBIANS' SOLVENT STATUS, THE BANK SHOULD HAVE A CLAIM IN BANKRUPTCY FOR ITS ATTORNEYS' FEES

The FOBIANS are solvent debtors with substantial net worth. They filed their Chapter 12 Bankruptcy Petition to pressure the BANK, their only unpaid creditor, into accepting real property collateral or a 40 year promissory note, each worth $70,500.00, in full satisfaction of a $191,660.09 debt.[4] In so doing, the FOBIANS ran afoul of

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[4] In their Plan, the FOBIANS proposed to either "refinance" the $191,660.09 debt in exchange for a new 40 year $70,500 promissory note, or to surrender real property collateral to the BANK in full satisfaction of the debt. The real property was by the FOBIANS' own admission worth $70,500. The BANK did not elect either alternative in the Plan. The FOBIANS then elected the second alternative, surrender of the property. *In re Fobian, supra*, 951 F.2d at 1150-1152.

two of the most fundamental principles underlying bankruptcy law. First, the FOBIANS sought not only a "fresh start," but a head start at the expense of the BANK.[5] Second, the FOBIANS failed to propose a Plan providing fair and equitable treatment of the BANK's claims.

The Bankruptcy Appellate Panel of the Ninth Circuit (the "BAP") and the Ninth Circuit Court of Appeals agreed with the BANK'S objection to the FOBIANS' Plan and required that the Plan provide for payment of the unsecured portion of the BANK's claim. However, that portion of the BANK'S claim for attorneys' fees was denied despite contractual provisions in the loan documents that expressly provided for attorneys' fees in the event the BANK was forced to protect its financial interest in a bankruptcy proceeding.[6]

The fundamental principles of bankruptcy referenced above were further violated when the FOBIANS proposed to entirely avoid their expressly-bargained-for attorneys' fees obligation. When debtors are solvent or when the dispute is between a creditor and a debtor, courts generally award unsecured creditors their attorneys' fees. This results, in part, from policy considerations similar to those present in the context of allowance

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[5] Focusing on the first principle when he introduced the consumer bankruptcy reform package to Congress on June 29, 1984, the Honorable Orrin G. Hatch remarked that the bill intended to "ensure that a 'fresh start' does not become a 'head start'." 1984, *U.S. Code Congr. & Admin. News*, p. 598; see also *In re Ramm Industries, Inc.*, 83 B.R. 815, 825 (Bkrtcy. M.D. Fla. 1988).

[6] See Footnote No. 1, *infra*, at pages 1-2.

of post-petition interest to unsecured creditors.[7] To provide a legal mechanism whereby solvent debtors, such

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[7] *In re Continental Airlines Corp.*, 110 B.R. 276, 280 (Bkrtcy. S.D. Tex. 1989) (Continental was solvent. Thompson was employed as a pilot for Continental. He filed a proof of claim for settling expenses pursuant to his employment agreement. Under Texas law, attorneys' fees are allowed if the claim is based on an oral or written contract. Continental objected and Thompson prevailed. The court granted Thompson attorneys' fees incurred in litigating his claim. The Court stated, " . . . at least as an issue of policy, as in the case of interest, creditors should be entitled to the recovery of attorney fees in instances where the debtor is solvent and they would be entitled to attorney fees under state law for litigation over the validity and amount of their claim." . . . "This Court finds no logical reason to prohibit the allowance of attorney's fees for professional services rendered in successfully establishing a disputed unsecured claim when the debtor is solvent.");

Liberty National Bank and Trust Co. v. George, 70 B.R. 312, 317 (W.D. Ky. 1987) (Adding a claim of $317,759.67 for attorneys' fees incurred for both pre-and-post-petition activities to the secured debt, the creditor became undersecured in the amount of $172, 865.23. The debtor was solvent. The court states, "the bankruptcy court should not have limited Liberty's claim for contractual attorney's fees to the value of the excess collateral, but should have allowed the balance of these fees as an unsecured claim under Section 502(b)(1) (Citations).");

In re Lorenzo Bancshares, Inc., 122 B.R. 270 (Bkrtcy. N.D. Tex. 1991) (After default, the unsecured creditors accelerated their subordinated debentures and filed suit in state court for collection. Thereafter, the Obligor/Debtor filed for protection under the bankruptcy code and the state suit was removed to the bankruptcy court. The creditors prevailed and requested attorneys' fees to which they would be entitled under Texas state law. The Debtor objected in that some of the fees were incurred for preparing a proof of claim, preparing objections to plan and other bankruptcy monitoring services. The Court granted the

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as the FOBIANS, could further increase their substantial net worth by sidestepping an obligation they agreed to would work a grave injustice on creditors. It is undisputed that there were ample assets in the FOBIANS' estate to pay the BANK'S attorneys' fees in full and provide the FOBIANS with a healthy fresh start. The BANK should be granted its claim for attorneys' fees.

III.

REASONS FOR GRANTING THE BANK'S WRIT

The *Fobian* decision is the result of the Ninth Circuit's confusion over the statutory basis for the award of post-petition attorneys' fees in bankruptcy proceedings. In broadly devising a *per se* rule that a contractual attorneys' fees provision is inapplicable when "the litigated issues involve not basic contract enforcement questions, but issues peculiar to federal bankruptcy law," the Ninth Circuit went far beyond the language and purpose of the Bankruptcy Code. *In re Fobian, supra,* 951 F.2d at 1153.

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fees stating, "payment of these debentures comes immediately ahead of any payment to or retention of property by the shareholders. Equity demands that the plaintiffs receive the attorney's fees to which they are entitled under Texas law before any distribution is made to or any property is retained by the shareholders in this Chapter 11 proceeding.").

See also In re Sakowitz, Inc., 110 B.R. 268, 270 (Bkrtcy. S.D. Tex. 1989) (The debtor was insolvent. The court did not grant contractual attorneys' fees to the undersecured creditor. Nevertheless, the court stated ". . . This court is of the opinion that attorney fees should be allowed where the debtor is solvent (before and after the allowance) due to policy considerations akin to those with respect to the allowance of interest post-petition (citations omitted)."

Though perhaps not intended, the *Fobian* decision may undermine the clear language and intent of 11 U.S.C. Section 506(b).

Under *Fobian*, whether a creditor's claim for contractual attorneys' fees will be allowed depends upon whether the bankruptcy activities for which the fees were incurred involve either "issues peculiar to federal bankruptcy law" or "basic contract enforcement questions." If the bankruptcy activities for which the fees were incurred involve "issues peculiar to federal bankruptcy law," the creditor will not have a claim for the fees. However, if the creditor's bankruptcy activities involve "basic contract enforcement questions," a claim for fees is added to the existing claim of the creditor. The *Fobian per se* rule neither distinguishes between oversecured and unsecured or undersecured creditors, nor differentiates between solvent and insolvent debtors.

In conflict with the *Fobian* rule, the Second, Fifth, Sixth, Eighth, and Eleventh Circuits, the District Court in the Southern District of New York, and Bankruptcy Courts in the Districts of Northern Texas, Middle Tennessee, Western Wisconsin, and Southern New York have held that an unsecured or undersecured creditor is entitled to a claim for attorneys' fees incurred for post-petition bankruptcy services. These courts did not base their decisions on the analysis advocated in *Fobian*. Instead, they found that the entitlement to those fees was defined and authorized by state law. (See Section A below.).

The District Court of Western Kentucky and the Bankruptcy Courts from the Districts of Southern and Northern Texas are in conflict with *Fobian* for different reasons. These courts granted attorneys' fees to the

unsecured or undersecured creditor for policy reasons, not because they concluded that the litigated issues were "basic contract enforcement actions." Like the FOBIANS, the Texas and Kentucky debtors were solvent. (See Section B below.

Two other bankruptcy decisions from the Southern District of Texas, *In re Sakowitz, Inc.*, 110 B.R. 268, 272 (Bkrtcy. S.D. Tex. 1991) and the Western District of Virginia, *In re Saunders*, 130 B.R. 208, 214 (Bkrtcy. W.D. Va. 1989), denied the undersecured creditors' claims for contractual attorneys' fees. However, these decisions also conflict with *Fobian* in holding that an unsecured creditor is not entitled to a claim for contractual attorneys' fees. These courts concluded that Congress intended to exclude such claims by only providing for fees to oversecured creditors under 11 U.S.C. Section 506(b).

Finally, the *Fobian* decision cannot be harmonized with prior Ninth Circuit rulings. (See Section C below.) Nor does the decision provide any guidance as to which bankruptcy activities involve "issues peculiar to federal bankruptcy law." (See Section D below.) The confusion engendered by the *Fobian* decision prevents the establishment of uniform bankruptcy laws, creates uncertainties, encourages forum shopping and increases, rather than decreases, the cost of bankruptcy administration.

A. *Fobian* Is In Conflict With the Second, Fifth, Sixth, Eighth and Eleventh Circuits and with the District Court of Southern New York and Bankruptcy Courts in the Districts of Southern New York, Northern Texas, Middle Tennessee and Western Wisconsin.

Decisions from the Second, Fifth, Sixth, Eighth and Eleventh Circuits, the District Court of Southern New

York and Bankruptcy Courts in the Districts of Northern Texas, Middle Tennessee, Southern New York, and Western Wisconsin are in conflict with the *Fobian* decision. These courts granted unsecured or undersecured creditors' claims for attorneys' fees incurred in connection with various bankruptcy activities when the contract so provided. The entitlement to such fees was not based on a characterization of the bankruptcy activity as a "basic contract enforcement action" as opposed to activities involving "issues peculiar to bankruptcy law." Instead, these courts reasoned that creditors' claims for attorneys' fees are defined and authorized by state law.[8]

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[8] *In re United Merchants*, 674 F.2d 134, 137 (2nd Cir. 1982) (This case is a pre Bankruptcy Code case in which the Court granted contractual attorneys' fees to the unsecured creditor for monitoring the bankruptcy proceeding, filing a proof of claim and participating in a Plan. The court stated "[t]he validity of a clause in a loan agreement providing for recovery of collection costs upon default is determined by state law- . . . The case law does not support a distinction between secured and unsecured creditors who seek to recover collection costs in bankruptcy." Responding to the debtor's argument that the new Section 506(b) provides for attorneys' fees to oversecured creditors only, the court stated, "[s]ection 506(b), however, merely codifies pre-Code law that an *oversecured* creditor can assert, *as part of its secured claim*, its right to interest and costs arising under its credit agreement.";

LeLaurin v. Frost National Bank, 391 F.2d 687 (5th Cir.), cert. den., 393 U.S. 979, 89 S.Ct. 447, 21 L.Ed.2d 440 (1968) (This too is a case decided under the former Bankruptcy Act. Here, an attorney sued his client seeking attorneys' fees earned from prosecuting the bank's claim on a promissory note against a debtor. The attorney urged that his client was bound by the amount of attorneys' fees determined by the bankruptcy court

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B. *Fobian* is in Conflict With the District Court of Western Kentucky and the Bankruptcy Courts of the Districts of Southern and Northern Texas.

One other District Court decision and two other Bankruptcy Court decisions are in conflict with *Fobian*. In

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in connection with his client's proof of claim against the debtor. However, the Fifth Circuit held that the principle of *res judicata* did not apply in that instance. The significance of that case is the fact that the bankruptcy judge had awarded a $25,000 attorney fee on the *unsecured portion* of the bank's claim.);

In the Matter of Jordan, 927 F.2d 221, 227 (5th Cir. 1991). In this case, the prevailing unsecured creditor was awarded contractual attorneys' fees in a consumer debt nondischargeability proceeding. The *Jordan* court stated, "[w]e do not think that section 523(d) prevents the award of attorneys' fees and costs to creditors so entitled as a matter of contract under state law . . . *To the contrary, 11 U.S.C. Section 523(a)(2)(B) excepts from discharge the whole of any debt incurred by use of a fraudulent financial statement, and such a debt includes state-approved contractually required attorney's fees.") (Emphasis added in original);*

In re Martin, 761 F.2d 1163, 1168 (6th Cir. 1985). (Here the Bank was successful in its nondischargeability action against a consumer debtor. The Court awarded contractual attorneys' fees to the Bank. Recognizing that Congress intentionally provided for reimbursement of attorneys' fees to the prevailing consumer debtor, the Court stated, "[h]owever, creditors are entitled to recover attorneys' fees in bankruptcy claims if they have a contractual right to them valid under state law, which appears to be the case here, as the note itself provided that the Martins would reimburse the Bank for the costs and attorneys' fees necessary to collect the note (citations omitted). The validity of the creditor's claim for attorneys' fees does not depend on whether the obligation is secured (unless state law so provides). . . . We do not think that section 523(d) prevents the

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Liberty National Bank and Trust Co. v. George, supra, 70 B.R. at 317 (W.D. Ky. 1987), *In re Continental Airlines, supra,* 110

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award of attorney's fees and costs to creditors so entitled as a matter of contract under state law.");

In re Morris, 602 F.2d 826, 828 (8th Cir. 1979). (In this pre-Code case, the court granted fees incurred by an undersecured creditor in monitoring the bankruptcy proceeding, pursuing an unsuccessful motion for relief from stay and prosecuting a proof of claims action. The court based its fee award on sweeping language of a fee clause which provided fees for collection costs.);

Transouth Financial Corp. of Florida v. Johnson, 931 F.2d 1505, fn.3 at 1507, 1509 (11th Cir. 1991) (Here the court granted an unsecured consumer creditor attorneys' fees incurred in non-dischargeability proceeding. The court stated, "[a]fter examining the plain language of Section 523 and the policy of the Bankruptcy Code, in general, and Section 523, in particular, we hold that a creditor successful in a dischargeability proceeding may recover attorneys' fees when such fees are provided for by an enforceable contract between the creditor and debtor.");

In re Ladycliff College, 56 B.R. 765, 769 (S.D.N.Y. 1985) (In this case, the court granted an undersecured creditor contractual attorneys' fees incurred in a proof of claim proceeding. The court found that such an unsecured claim for expenses is not barred by Section 506[b].);

In re Missionary Baptist Foundation of America, Inc., 24 B.R. 970, 971 (Bkrtcy. N.D. Tex. 1982) (Here too the court granted contractual fees incurred in connection with settlement negotiations and a proof of claim to the unsecured creditor. The court stated "[t]he clause providing for attorneys' fees upon default is valid under Texas law and should be enforceable under Federal Bankruptcy law.");

In re Foster, 38 B.R. 639, 642 (Bkrtcy. M.D. Tenn. 1984) (The prevailing unsecured commercial creditor in this case was awarded contractual attorneys' fees in commercial debt

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B.R. at 280 (Bkrtcy. S.D. Tex. 1989), and *In re Lorenzo Bancshares, Inc., supra,* 122 B.R. at 273 (Bkrtcy. N.D. Tex. 1991), the courts allowed claims for attorneys' fees to the unsecured or undersecured creditors. Like the FOBIANS, the debtors were solvent in each of these cases. The Texas and Kentucky courts did not analyze whether the fees were incurred in connection with "basic contract enforcement actions" as opposed to "issues peculiar to federal bankruptcy law." Nor did they hold that claims for

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nondischargeability proceeding. The Foster court stated, "If it is appropriate as a matter of bankruptcy policy to provide for the recovery by honest debtors of attorneys' fees when they are successful in fraud dischargeability proceedings, it would appear to be equally appropriate as a matter of bankruptcy policy to permit honest creditors to recover attorneys' fees which dishonest debtors have contracted to pay. The bankruptcy policy considerations are the same – to insure that the honest do not forfeit their rights out of concern for the expenses of litigation.");

In re A. Tarricone, Inc. 83 B.R. 253 (Bkrtcy. S.D.N.Y. 1988) (Here an unsecured creditor filed a complaint for declaratory relief in bankruptcy court that debtor had no property interest in a leased warehouse. After the creditor obtained a stipulation and consent order in his favor, he requested contractual attorneys' fees as an administrative expense. The court permitted the creditor to file an unsecured claim for attorneys' fees.);

In Re Tri-State Homes, Inc., 56 B.R. 24, 26 (Bkrtcy. W.D. WI 1985) (The debtor here sued the unsecured creditor to have a stock redemption agreement declared null and void. The creditor prevailed and sought to tax fees as costs either under 28 U.S.C. 1920 or to amend the claim to include fees. The court found that litigation fees became part of the debtor's contractual debt and granted leave to file an amended claim. The court stated, "[t]he court found nothing in bankruptcy policy or case law which supported a distinction between secured and unsecured creditors who seek to recover collection costs in bankruptcy.").

attorneys' fees must be defined and authorized by state law, as in the cases cited in footnote no. 8, above. Instead, these courts granted claims for attorneys' fees incurred in connection with various bankruptcy activities for compelling policy reasons.

C. *Fobian* Cannot Be Harmonized with Prior Rulings of the Ninth Circuit.

In the case of *In the Matter of 268 Limited*, 789 F.2d 674, 678 (9th Cir. 1986), the Ninth Circuit did not question an unsecured or undersecured creditor's *entitlement* to contractual attorneys' fees. Nor did the court condition the award of attorneys' fees on a finding that they were incurred litigating issues involving only "basic contract enforcement questions." The court in *268 Limited* held that 11 U.S.C. Section 506(b) requires a new federal reasonableness standard on post-petition attorneys' fees claimed by oversecured creditors. Applying this new reasonableness standard, the court reduced the fees requested by the creditor to $20,000.00. These fees then were added to the creditor's secured claim. The creditor also was permitted to claim the contractual fees in excess of the $20,000.00 as part of its unsecured claim.

In the case *In re J.F. Hink & Son*, 815 F.2d. 1314, 1318 (9th Cir. 1987), the court awarded the prevailing Trustee/lessor his contractual attorneys' fees that he incurred in litigating an issue involving the enforceability of 11 U.S.C. Section 365(f)(3). Under *Fobian*, such an award arguably would be disallowed.

D. The *Fobian* Rule Provides No Guidance for Determining Which Bankruptcy Activities Involve "Issues Peculiar to Federal Bankruptcy Law."

Under *Fobian*, bankruptcy courts must disallow a creditor's claim for contractual attorneys' fees if the litigated issues involve "issues peculiar to federal bankruptcy law." Unfortunately, *Fobian* provides no guidance to the bankruptcy courts to determine which bankruptcy activities fall within this category. It is this uncertainty that will cause unnecessary litigation and increase the cost of bankruptcy administration. That uncertainty will greatly undermine bankruptcy and appellate courts' attempts to create a uniform system of bankruptcy rules.

Under *Fobian*, bankruptcy activities such as plan litigation, motions for relief from stay, and nondischargeability proceedings apparently would fall into the forbidden category for which the Ninth Circuit will not grant attorneys' fees. *See In re Fobian, supra*, 951 F.2d at 1153.[9] This is in conflict with decisions from the Fifth, Sixth, Eighth, and Eleventh Circuits and from the Bankruptcy Court of the District of Middle Tennessee discussed above.

The Fifth Circuit, in *In re United Merchants, supra*, 674 F.2d at 139 (2nd Cir. 1982) granted an unsecured creditor's claim for attorneys' fees incurred in negotiating a plan and participating in the Chapter 11 proceeding. The

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[9] The *Fobian* case incorrectly describes the litigated issue raised in *In re Coast Trading Co.*, 744 F.2d 686 (9th Cir. 1984). (*Coast Trading* did not involve a nondischargeability action, but an action to rescind or disavow a contract.) *See also In re Fulwiler*, 624 F.2d 908 (9th Cir. 1980). (This case is a pre-Code nondischargeability proceeding, not an action under Section 546 as *Fobian* asserts.)

unsecured creditors' claims for fees incurred in non-dischargeability proceedings were granted in *In the Matter of Jordan, supra,* 927 F.2d 221 (5th Cir. 1991); *In re Martin, supra,* 761 F.2d 1163 (6th Cir. 1985); *Transouth Financial Corp. of Florida v. Johnson, supra,* 931 F.2d 1505 (11th Dist. 1991), and *In re Foster, supra,* 31 B.R. 639 (Bkrtcy. M.D. Tenn. 1984). Finally, the Eighth Circuit in *In re Morris, supra,* 602 F.2d at 828 (8th Cir. 1979) granted unsecured creditors' claims for attorneys' fees incurred in connection with motions for relief from stay.

IV.

THE AUTHORITIES CITED BY THE NINTH CIRCUIT IN *FOBIAN* DO NOT SUPPORT ITS *PER SE* ATTORNEYS' FEES RULE

The court in *Fobian* relied on the following cases in rendering its decision: *Collingwood Grain, Inc. v. Coast Trading Co. (In re Coast Trading Co.),* 744 F.2d 686, 693 (9th Cir. 1984); *Grove v. Fulwiler (In re Fulwiler),* 624 F.2d 908, 910 (9th Cir. 1980); and *Johnson v. Righetti (In re Johnson),* 756 F.2d 738, 741-42 (9th Cir. 1985). However, these cases do not provide the requisite foundation for *Fobian's* sweeping *per se* rule that absent bad faith or harassment, attorneys' fees will not be awarded "where the litigated issues involve not basic contract enforcement questions, but issues peculiar to federal bankruptcy law."

In *Coast Trading, supra,* 744 F.2d at 693, the court based its denial of attorneys' fees on Oregon Rev. Stat. Section 20.096[10] and on the narrow language of the

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[10] This section provides as follows: "In an action or suit on a contract, where such contract specifically provides that attorney fees and costs incurred to enforce the provisions of the

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attorneys' fees clause and Section 20.096 were found to limit reimbursement of fees to those incurred in an action to "enforce a contract." *Coast Trading* was an action to rescind and disavow, not enforce, the contract. *Id.*

The *Fulwiler* case was a nondischargeability action decided under the former Act. The debtor prevailed and requested attorneys' fees under the unilateral attorneys' fees provision in the loan documents and under Oregon Rev. Stat. Section 20.096. Again, the court found that the statute did not apply. Under federal law, the court had no authority to make the unilateral fee provision reciprocal. *In re Fulwiler, supra,* 624 F.2d at 910.

Finally, in *Johnson, supra,* 756 F.2d, 741-742, the prevailing debtor requested reimbursement of attorneys' fees under California Civil Code Section 1717.[11] Like its Oregon counterpart, Section 1717 applies only to actions on contracts, where the contract specifically provides for an award of attorneys' fees incurred to enforce that contract. The court held that motions for relief from stay are not actions to "enforce a contract."

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contract shall be awarded to one of the parties, the prevailing party, whether that party is the party specified in the contract or not, at trial or on appeal, shall be entitled to reasonable attorney fees, in addition to costs and disbursements."

[11] This section provides as follows: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the prevailing party, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements . . . "

In *In re Johnson* and *In re Fulwiler,* the debtors sought recovery of their attorneys' fees, not the creditors. The debtors sought to enforce state "reciprocity" provisions for contracts containing unilateral attorneys' fees provisions. Finding the state statutes inapplicable, these courts concluded that there was no reciprocity. In *Fobian,* the *creditor* requested an award of attorneys' fees. The distinction is significant and controlling. A creditor may be allowed its reasonable fees as part of its claim in a bankruptcy under 11 U.S.C. Section 502(b).

V.

CONCLUSION

The *amicus curiae* applicants pray that the BANK's Petition for Writ of *Certiorari* be granted to review the judgment of the Court of Appeals for the Ninth Circuit in *In re Fobian.* In the event that the BANK's Petition is granted, the *amicus curiae* applicants pray that the judgment of the Court of Appeals as to the award of attorneys' fees as part of the BANK's claim be reversed and that the case be remanded for proceedings consistent with this Court's ruling.

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Respectfully submitted,

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